SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 186

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION No. 89 INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. OF L., ETC., ET AL., PETITIONERS,

vs.

THE AMERICAN TOBACCO COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

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[fols. a-1] [Caption omitted]

[fol. 2]

IN JEFFERSON CIRCUIT COURT, CHANCERY BRANCH, — DIVISION

THE AMERICAN TOBACCO COMPANY, INC. (1700 W. Broadway), Plaintiff,

vs.

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an Unincorporated Labor Union (813 South First St.); Paul W. Priddy (1472 Kentucky Ave.); Joseph Burrell (Address Unknown); Stoy Decker (2311 W. Lee); Willard Marples (131 E. Avery St.); James Mallory (1111 Oldham Ct., Apt. 19); Alma Harper (511 S. 21st St.); Individually, and as Representatives of a Class Consisting of Members of General Drivers, Warehousemen and Helpers, Local Union #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an Unincorporated Labor Union, Defendants

PETITION IN EQUITY—Filed April 4, 1953

Plaintiff, The American Tobacco Company, Inc., states that it is and at all time hereinafter mentioned it was a corporation organized under and existing by virtue of the laws of the State of New Jersey, with power to sue and be sued, contract and be contracted with, and to carry on, in intra and interstate commerce in the State of Kentucky and elsewhere, the business of manufacturing and selling cigarettes and other tobacco products.

The defendant, General Drivers, Warehousemen and Helpers, Local Union #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., is an unincorporated labor organization, consisting of employees of numerous other corporations, firms and individuals engaged principally in the

business of transporting and warehousing merchandise in [fol. 3] the City of Louisville, in the State of Kentucky, and in surrounding territories. It is comprised of members so numerous as to render it impracticable to bring them all before the Court within a reasonable time and their names are unknown to the plaintiff. None of plaintiff's employees are members of said union, nor is it the authorized agent for collective bargaining or any other purpose of any employee of plaintiff. For convenience it will hereafter be referred to as Local 89.

Paul W. Priddy, Joseph Burrell, Stoy Decker, Willard Marples, James Mallory and Alma Harper are members of Local 89 aforesaid and they and each of them are made defendants individually and for and on behalf of the class consisting of all the members of said Local 89 to which the said individual members belong. In addition to being members of Local 89, Paul W. Priddy is President thereof; Joseph Burrell is Vice-President thereof; and Stoy Decker is Business Agent thereof.

Plaintiff states that it is a corporation engaged in the manufacture and sale of cigarettes and other tobacco products with a nationwide business, and that in the course of that business a substantial portion of the raw materials and supplies which it uses move to its Louisville factory in interstate commerce, and a substantial portion of the manufactured products of said factory are sold in interstate commerce; that its factory, with respect to which this action is concerned, is located in the City of Louisville, at 17th Street and Broadway, and that it has approximately fifteen hundred employees working in said factory.

That plaintiff's employees at its said factory are all represented by a different labor organization from Local 89, and no grievance or dispute exists between plaintiff and [fol. 4] any of its employees, and that none of the actions of defendants hereinafter described were done on behalf of plaintiff's employees or with the purpose of representing plaintiff's employees, or of obtaining any benefit for them, or of obtaining their membership in Local 89, or of obtaining the right of Local 89 to represent them. A contract covering wages and working conditions is presently in force between plaintiff and all its employees and said

employees are working harmoniously under said contract and desire to continue to do so without interference or molestation. Said contract provides that plaintiff's employees will not participate in any unauthorized strike and no strike has been authorized for said employees.

Plaintiff states that Local 89 is the authorized representatives for the purposes of collective bargaining of certain employees of a separate corporation, to-wit, American Suppliers, Incorporated, and that many of the persons who have been picketing plaintiff's factory, including Willard Marples, James Mallory, and Alma Harper are employees of American Suppliers, Incorporated. A dispute exists between said corporation and its said employees and Local 89 as the bargaining agent of said employees, but said dispute has no connection with this plaintiff, and plaintiff is not a party thereto, nor involved therein, nor are any of plaintiff's employees.

Said American Suppliers, Incorporated, is a Delaware corporation engaged in the business of purchasing, curing, and processing leaf tobacco, which is entirely different from the business of manufacturing cigarettes and other tobacco products engaged in by the plaintiff, and the two corporations have no officers in common and maintain separate offices and manufacturing plants for the carrying on of their different businesses. Plaintiff is the owner of a majority of the stock in said corporation and [fol. 5] has heretofore purchased tobacco from said corporation. But the employees and the types of business and the businesses actually carried on by said two corporations are entirely separate. Said American Suppliers, Incorporated, has heretofore operated a plant immediately behind plaintiff's factory above described in which it processed tobacco, but said plant used a separate loading dock and entrance located on 17th Street for the movement of merchandise and personnel in and out of said plant. The principal entrance to plaintiff's plant, on the other hand, is on Broadway and is not now and has never been used by American Suppliers, Incorporated, for ingress and egress of personnel or shipment or receipt of merchandise.

At the present time and since the beginning of the strike

hereinafter described, plaintiff is not procuring merchandise from, or doing business with, the Louisville Plant of American Suppliers, Incorporated.

In spite of the fact that there is no connection between plaintiff's employees or plaintiff on the one hand and the defendants or any of them on the other, the defendants have since the morning of Monday, March 30, 1953, established and maintained a picket line consisting of a large and unreasonable number of pickets around plaintiff's said factory and has endeavored to prevent plaintiff's employees from working and to prevent plaintiff from carrying on its operations and to prevent other corporations, including common carriers, contract carriers, warehousemen and various other unrelated types of businesses doing business with plaintiff, from performing their contracts with plaintiff, and from performing their legal obligations to plaintiff by receiving, transporting, handling, and delivering plaintiff's merchandise—all in violation of the public policy [fol. 6] and the law of the State of Kentucky.

In the course of said activities and as a means of promoting and effecting said unlawful objectives, the defendants, including not only those expressly hereinabove named but also many other members of Local 89 whose names are unknown to plaintiff, and other persons associating and confederating with them, have done the following acts:

1. They have blocked all the entrances to plaintiff's factory so that the employees of plaintiff and members of the public and persons doing business with plaintiff are interfered with and in some instances physically prevented from going in and out of such entrances.

2. They have established picket lines consisting of large numbers of people and have assembled other large groups of people in front of, around, and immediately adjacent to plaintiff's said factory for the purpose of intimidating by their numbers persons desiring to enter or leave plaintiff's premises and particularly employees of the plaintiff.

3. They have attempted to draw into their dispute with American Suppliers, Incorporated, strangers to their dispute, to-wit: Plaintiff and its employees, its suppliers, its customers and the other persons with whom plaintiff does business, none of whom are within the sphere of the dis-

pute between the defendants and American Suppliers, Incorporated.

4. Their acts constitute unlawful, unjustified, and malicious interference with the business of plaintiff and of its relations with its employees and also amount to unlawful hindering of persons who desire to labor from doing so, in that defendants, without just cause or legal excuse for so doing, have entered into a confederation, conspiracy, agreement, arrangement or understanding for the purpose of [fol. 7] hindering, delaying, or preventing plaintiff from carrying on its lawful business.

5. They have unlawfully interfered with the property rights of the plaintiff, including, among other things, its contract of employment with its employees.

6. They have by the acts hereinabove and hereinafter described endeavored to coerce and intimidate plaintiff's employees into committing a breach of their contract of employment with the plaintiff.

7. The defendants and particularly those engaged in picketing plaintiff's plant as aforesaid, have used vile, profane, threatening, and slanderous language to young women and other employees of the plaintiff, who undertake to go in and out of plaintiff's places of business.

8. They have made physical attacks upon employees of plaintiff principally upon young women who were endeavoring to enter or leave plaintiff's premises of such severity that at least two of plaintiff's employees have required hospitalization or medical treatment.

9. They have made telephone calls to plaintiff's employees threatening serious bodily injury and destruction of their property if they continue to work for plaintiff.

10. They have meddled with, damaged, and forcibly occupied automobiles belonging to plaintiff's employees. They have forcibly occupied and refused to leave the automobile of one employee and have let the air out of the tires of the automobile of another employee.

11. They have thrown missiles at trucks making deliveries to plaintiff's premises.

[fol. 8] 12. They have followed plaintiff's trucks in automobiles occupied by three or more persons in a manner calculated to indicate a threat of bodily harm to the operators of said trucks.

13. They have induced, encouraged, and coerced and conspired with the employes of sundry common carrier truck lines, sundry contract carrier truck lines, and sundry other unrelated corporations, firms and individuals with whom plaintiff ordinarily does business, to refuse and to cause their employers to refuse: To receive shipments of merchandise from plaintiff, including not only shipments originating at plaintiff's Louisville factory, but also shipments originating outside the State of Kentucky, these shipments of both classes including property moving in interstate commerce as well as property moving in intrastate commerce; to transport shipments of all the above-named classes to or from the plaintiff; to deliver shipments of all the said classes either to plaintiff's factory or to plaintiff at their own loading docks or terminals or other places remote from plaintiff's factory, or to deliver the same to carriers and other agents employed by plaintiff to receive the same; to deliver to plaintiff, plaintiff's agents, or any person acting for plaintiff, property in their possession belonging to plaintiff and to which plaintiff was entitled to immediate possession.

14. In addition to the complete refusal above-mentioned, said defendants, their employers, and the persons acting with them, as above set out, have refused to do the said acts, excepting after unreasonable delay and excepting after obtaining the specific permission therefor from the defendant Local 89, thereby subjecting plaintiff to delay, inconvenience, and expense in obtaining its property.

[fol. 9] 15. They have induced, encouraged, and caused the truck drivers of one of plaintiff's suppliers engaged in unloading merchandise at plaintiff's loading dock to uncouple the tractor unit from the trailer unit of their trucks and to leave two large trailer units blocking plaintiff's loading dock for an extended period.

All of said acts were done for the wrongful and unlawful purposes of embroiling plaintiff and its employees in a labor dispute with which they have no concern; of interfering with plaintiff's relations with its employees and their reciprocal contract obligations; of inducing, encouraging, and coercing other persons, firms, and corporations to refuse to enter into or perform contracts with plaintiff in

accordance with their legal obligations to plaintiff and their duties as common carriers and as custodians of property belonging to, shipped to, or shipped by, plaintiff.

Said acts and each of them were performed not only by the defendants, but by other persons associated, confederated, and conspiring and acting in concert with them.

The unlawful activities of the defendants hereinbefore set out have resulted and will continue to result in great and irreparable injury suffered by plaintiff, and which plaintiff will continue to suffer, and in the violation of plaintiff's rights for which it has no adequate remedy at law or otherwise, save in a Court of Equity; irreparable injury and damage will result to plaintiff from the delay in giving notice of its application for an injunction. No previous application for an injunction herein has been made or refused by this Court or any other Circuit Judge, or at all.

Wherefore, plaintiff, the American Tobacco Company, Inc., prays that the defendants, General Drivers, Warehousemen and Helpers, Local Union #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen [fol. 10] and Helpers of America, A. F. of L., and unincorporated labor union; Paul W. Priddy, Joseph Burrell, Stoy Decker, Willard Marples, James Mallory and Alma Harper, individually, and as representatives of a class consisting of members of General Drivers, Warehousemen and Helpers, Local Union #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an unincorporated labor union, and each of them, and each of the members of said General Drivers, Warehousemen and Helpers, Local Union # 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an unincorporated labor union, and their confederates and associates, be temporarily restrained and temporarily and permanently enjoined:

1. From picketing or maintaining pickets or attempting to picket or maintain pickets at or about plaintiff's premises;

2. From taking any steps seeking to induce plaintiff's employees not to work for plaintiff;

3. From causing or threatening injury to the persons

or property of the employees of plaintiff, or the property of plaintiff;

4. From using abusive, vile, profane, or threatening language to plaintiff's employees or others seeking to enter or leave plaintiff's premises or to do business with plaintiff;

5. From refusing, or inducing, encouraging, coercing or otherwise causing, or arranging with, the employees of other employers, particularly common carriers, or with such employers, to refuse, to accept, handle, transport, and deliver, in accordance with their legal and contract obligations, property shipped by or to plaintiff.

Plaintiff further prays for its costs herein expended and for all further relief both general and equitable which may seem proper in the premises.

(S.) Sites Wood Helm & Taylor, Attorneys for Plaintiff.

[fols. 11-14] *Duly sworn to by J. G. Hager. Jurat omitted in printing.*

[fol. 15] In Jefferson Circuit Court, Chancery Branch
Temporary Restraining Order—April 6, 1953

At a court held April 6, 1953.

Comes the plaintiff, by counsel and filed a duly executed notice herein.

Comes plaintiff, by counsel and in writing filed, moved the court to grant it a temporary injunction restraining the defendants, General Drivers Warehousemen and Helpers, Local Union #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an unincorporated labor union; Paul W. Priddy, Joseph Burrell, Stoy Decker, Willard Marples, James Mallory, Alma Harper, individually, and as representatives of a class consisting of members of General Drivers, Warehousemen and Helpers, Local Union #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an unincorporated labor union, and each of them, including all members of said unin-

corporated labor union, and their agents, confederates and associates:

1. From picketing or maintaining pickets or attempting to picket or maintain pickets on Broadway at or about plaintiff's premises;

2. From taking any steps seeking to induce plaintiff's employees not to work for plaintiff.

3. From causing or threatening injury to the persons of property of the employees of plaintiffs, or the property of plaintiff;

4. From abusing, vile or profane or threatening language to plaintiff's employees or others seeking to enter or leave plaintiff's premises or to do business with plaintiff;

5. From refusing or inducing, encouraging, coercing or [fol. 16] otherwise causing or arranging with, the employees of other employees, particularly common carriers, or with such employers, to refuse, to accept, handle, transport and deliver in accordance with their legal and contract obligation, property shipped by or to plaintiff.

Com- the defendant, General Drivers, Warehousemen and Helpers Local Union #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., and Paul W. Priddy, Joseph Burrell, Stoy Decker, Willard Marples, James Mallory and Alma Harper, without waiving their jurisdiction of this court and in writing filed, moved the court to quash the summons and notice issued against them herein.

The court being advised, it is ordered by the Court that this motion be and the same is hereby overruled, to which the defendants object and except.

This cause coming on to be heard on motion for temporary restraining order and the court being advised, said restraining order is hereby issued and entered subject to the following conditions.

So long as this restraining order shall remain in force, plaintiff is ordered and directed not to permit any employees of American Suppliers, Inc., other than supervisory, clerical and maintenance, to use plaintiff's Broadway entrance, nor to use said Broadway entrance for the shipment of tobacco in or out of American Suppliers, Inc., plant on the premises.

This action not having been assigned to either division

of the Chancery Branch of this Court, came on for hearing before the Judge of the First Division at 2 P. M., on April [fol. 17] 6, 1953, pursuant to notice, upon the verified petition of the plaintiff herein and the affidavit therein contained.

And counsel being heard, and it further appearing to the Court that danger of great and irreparable injury to the plaintiff and its employees might be caused by failure to issue a restraining order, or from the delay of giving further notice.

It Is Ordered:

That the defendants, General Drivers, Warehousemen and Helpers, Local Union #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an unincorporated labor union; Paul W. Priddy, Joseph Burrell, Stoy Decker, Willard Marples, James Mallory, Alma Harper, individually and as representatives of a class consisting of members of General Drivers, Warehousemen and Helpers, Local Union #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an unincorporated labor union and each of them, and all members of said unincorporated labor union, and their confederates and associates, until plaintiff's motion for a temporary injunction can be heard and determined, be temporarily restrained:

1. From picketing or maintaining pickets or attempting to picket or maintain pickets on Broadway at or about plaintiff's premises;

2. From taking any steps seeking to induce plaintiff's employees not to work for plaintiff;

3. From causing or threatening injury to the persons or property of the employees of plaintiff or the property of plaintiff;

4. From using abusive, vile, profane or threatening lan- [fols. 18-34] guage to plaintiff's employees or others seeking to enter or leave plaintiff's premises or to do business with plaintiff;

5. From refusing or inducing, encouraging, coercing or otherwise causing, or arranging with, the employees of other employers, particularly common carriers, or with such employers, to refuse to accept, handle, transport and deliver in

accordance with their legal and contract obligations, property shipped by or to plaintiff.

Plaintiff's motion for a temporary injunction is hereby set for hearing before the Judge of the Chancery Branch, 1st Division, Jefferson Circuit Court, in Louisville, Ky., on April 14th, 1953 at 2 P. M., and the restraining order herein granted shall continue in force until plaintiff's said motion is heard and determined.

This order shall not take effect and no restraining order hereunder shall be issued by the clerk until plaintiff shall have given bond with good surety, approved by the clerk of this court, wherein plaintiff shall obligate itself to pay to the defendante the damages, not exceeding one Thousand Dollars which they may sustain by reason of this restraining order if it is finally determined that said restraining order ought not to have been granted.

[fol. 35] In Jefferson Circuit Court, Chancery Branch, — Division

[Title omitted]

Affidavit—Filed April 10, 1953

[fol. 36] Lloyd Cardwell, being first duly sworn, states that about 2:30 P. M., on Thursday, April 9, 1953, he inquired of J. L. Biery as to the names of the persons concerned in the refusal of the Bowling Green Express, a common carrier, to handle or deliver a shipment of twist tobacco in the hands of said Company, pursuant to shipment from Nashville, Tennessee, to Louisville, Kentucky, and that said J. L. Biery advised him that the following employees of said Company had refused to handle or deliver said tobacco; Robert Smith, Charles Moore, Delmar Hightower, Jacob Lee, Jr., Christopher Evans, Ernest Spencer, and Fred Ham; that Robert Smith, as Shop Steward for Local 89, had obtained instructions from Local 89 through Marion N. Winstead and Virgil Denton, Business Agents of said Union, not to handle said tobacco and had, pursuant

to those instructions, forbidden the other employees above-named to handle the same.

(S.) Lloyd Cardwell.

Subscribed and sworn to before me by Lloyd Cardwell, this 10th day of April, 1953. My commission expires October 17, 1955. (S.) Alberta B. Terry, Notary Public, Jefferson County, Kentucky.

In Jefferson Circuit Court, Chancery Branch, — Division

[Title omitted]

Affidavit—Filed April 10, 1953

[fol. 37] G. J. Lodde, states that he is District Traffic Manager of the American Tobacco Company, 17th and Broadday, Louisville, Kentucky, and that on April 9, 1953, he telephoned J. L. Biery, Manager of the Bowling Green Express Company office at Louisville, Kentucky, to determine whether or not a shipment of 500 cases of Cotton Boll Twist Tobacco had been received from Nashville Branch, The American Tobacco Company, Nashville, Tennessee, for delivery to The American Tobacco Company at Louisville; that J. L. Biery advised him that said tobacco had arrived at the terminal of the Bowling Green Express Company at 13th and Market Streets but that Bob Smith, the union steward at the Bowling Green Express Company office refused to permit the Company to deliver said tobacco and refused to handle said tobacco if American Tobacco Company sent its own trucks out to pick it up, because the employees of the Bowling Green Express Company were members of General Drivers, Warehousemen and Helpers Local Union No. 89; that subsequently J. L. Biery advised this affiant that he had talked to Virgil Denton, head business agent of General Drivers, Warehousemen and Helpers Local # 89 who repeated the refusal to deliver or handle said tobacco.

Affiant further states that he again called J. L. Biery on April 10, 1953 and asked him when said tobacco would be delivered to American Tobacco Company; that J. L. Biery then informed him that the employees of Bowling Green

Express who are represented by Local # 89, still refused to deliver said tobacco to American Tobacco Company but that they would unload said tobacco from the semi-trailer on which it had been received in Louisville and would permit American Tobacco Company employees to load and remove said tobacco from the loading dock of the Bowling [fols. 38-44] Green Express Company.

Affiant states that on April 9 and 10, he advised J. L. Biery that a restraining order had been issued prohibiting refusal to deliver to American Tobacco Company, and that said J. L. Biery stated on April 10, 1953 that he had received a copy of said order. Affiant further states that on April 10, 1953 he advised said J. L. Biery that it would not be necessary for the employees of Bowling Green Express Company to cross any picket line in order to enter the premises of The American Tobacco Company for the purpose of delivering said tobacco.

(S.) George J. Lodde.

Subscribed and sworn to before me this 10th day of April, 1953. (S.) Clemens M. Hutti, Notary Public, Jefferson County, Ky. My commission expires January 28, 1955.

[fol. 45] In Jefferson Circuit Court, Chancery Branch, — Division

[Title omitted]

Response to Motion for Temporary Injunction and Answer to Petition—Filed April 14, 1953

Come the defendants, Paul W. Priddy, Joseph Burrell, Stoy Decker, Willard Marples, James Mallory, and Alma Harper, who for themselves in answer to the plaintiffs petition for injunction and in response to the plaintiffs Motion for a Temporary Injunction state:

I

The American Tobacco Company, Inc., plaintiff herein, and the American Suppliers, Inc., are engaged in interstate

commerce and in the transportation of articles in interstate commerce and by virtue of the statutes of the United States of America jurisdiction to enjoin unfair labor practices including alleged secondary boycotting activities is vested exclusively in the Federal Courts and the right to maintain such actions for injunction is vested exclusively with the General Council of the National Labor Relations Board.

II

Defendants, Paul W. Priddy, Joseph Burrell, Stoy Decker, [fol. 46] Willard Marples, James Mallory and Alma Harper, deny that there is no labor dispute existing between plaintiff in this action and the members of Local 89; denies that the plaintiff is not procuring merchandise from or doing business with the Louisville Plant of the American Suppliers, Inc., deny specifically each of the allegations Numbered 1 to 15 contained in plaintiffs petition and appearing on Pages four through seven.

Defendants, Paul W. Priddy, Joseph Burrell, Stoy Decker, Willard Marples, James Mallory and Alma Harper, further deny that from the actions of the defendants the plaintiffs have suffered and will continue to suffer, great and irreparable injury and that the plaintiffs have no adequate remedy at law or otherwise save in a Court of Equity against the actions of the defendants.

III

Defendants, Paul W. Priddy, Joseph Burrell, Stoy Decker, Willard Marples, James Mallory and Alma Harper, state that the American Suppliers, Inc., is a wholly owned subsidiary of the American Tobacco Company and that the activities of the American Tobacco Company, Inc., plaintiff herein, and the American Suppliers, Inc., are so interwoven that it is impossible to clearly demarcate the activities of the plaintiff from those of the American Suppliers, Inc.; they state that as a result of this strike plaintiff performing functions and activities normally performed by the American Suppliers, Inc.; that the employees of the American Tobacco Company are performing work normally performed by employees of the American Suppliers, Inc. and that non-striking employees of the American Suppliers, Inc. are using equipment and plant of the plaintiff to perform func-

[fol. 47] tions normally performed at the American Suppliers Plant; they further state that all of the activities that the American Suppliers, Inc. are normally performed and are now performed upon property completely controlled by the plaintiff herein.

IV

Defendants, Paul W. Priddy, Joseph Burrell, Stoy Decker, Willard Marples, James Mallory and Alma Harper, state that the situs of the dispute between members of the General Drivers, Warehousemen and Helpers, Local Union # 89, and the American Suppliers, Inc. is 1700 West Broadway; that the American Suppliers, Inc. is engaged in business there and that all picketing conducted against the American Suppliers, Inc. has been conducted within reasonable distance of the situs of dispute; that further they state that all picketing activities and activities related thereto have clearly disclosed that the dispute sought to be advanced by the picketing is with the American Suppliers, Inc.

V

Defendants, Paul W. Priddy, Joseph Burrell, Stoy Decker, Willard Marples, James Mallory and Alma Harper, further state that the plaintiff should be denied relief in this court because it has repeatedly violated the orders issued by this court in that:

1. Plaintiff has permitted Supplies and Equipment destined for delivery to the American Suppliers, Inc. to be delivered to their dock at 1700 West Broadway.

2. Plaintiff has permitted egress and ingress through their entrances of employees of the American Suppliers, Inc. other than management and office personnel.

[fols. 48-50] 3. American Tobacco Company is operating plant and facilities of American Suppliers Inc. with employees of the American Tobacco Co.

4. Plaintiff has wilfully mislead the court in stating that the facilities of the American Tobacco Co. have not been used for delivery and shopping of materials in commerce with the American Suppliers, Inc.

Wherefore the defendants, Paul W. Priddy, Joseph Burrell, Stoy Decker, Willard Marples, James Mallory and

Alma Harper, having fully answered pray that the plaintiffs petition and Motion for Temporary Injunction be dismissed; prays for their costs herein and for all relief to which they might in equity be entitled.

(S.) Hardy & Logan and Robert W. Zollinger, Attys. for Defendants; Paul W. Priddy, Joseph Burrell, Stoy Decker, Willard Marples, James Mallory and Alma Harper.

[fol. 51] In Jefferson Circuit Court Chancery Branch, — Division

[Title omitted]

Response and Answer to Petition of General Drivers, etc. —Filed April 15, 1953

Comes, Paul Priddy, who upon being ordered to defend the above styled action for and on behalf of the members of General Drivers Warehousemen and Helpers, Local #89, without waiving objections to the jurisdiction of this court heretofore raised and answering solely upon the order of the court without authorization to so answer by the members of General Drivers Warehousemen and Helpers, Local #89, states:

I

The American Tobacco Company, Inc., plaintiff herein, and the American Suppliers, Inc., are engaged in interstate commerce and in the transportation of articles in interstate commerce and by virtue of the statutes of the United States of America Jurisdiction to enjoin unfair labor practices including alleged secondary boycotting activities is vested exclusively in the Federal Courts and the right to maintain such actions for injunction is vested exclusively with the General Council of the National Labor Relations Board.

[fol. 52] Defendant, General Drivers Warehousemen and Helpers, Local #89, deny that there is no labor dispute existing between the plaintiff in this action and the members of Local #89; denies that the plaintiff is not procuring merchandise from or doing business with the Louisville Plant of the American Suppliers, Inc.; denies specifically each of

the allegations Numbered 1 to 15 contained in plaintiff's petition and appearing on Pages 4 through 7.

Defendant, General Drivers Warehousemen and Helpers, Local #89, denies that from the actions of the defendants the plaintiffs have suffered, and will continue to suffer, great and irreparable injury and that the plaintiffs have no adequate remedy at law or otherwise save in a Court of Equity against the actions of the defendants.

III

Defendant, General Drivers Warehousemen and Helpers, Local #89, state that the American Suppliers, Inc. is a wholly owned subsidiary of the American Tobacco Company, Inc., plaintiff herein, and the American Suppliers, Inc., are so interwoven that it is impossible to clearly demarcate the activities of the plaintiff from those of the American Suppliers, Inc.; that state that as a result of this strike plaintiff is performing functions and activities normally performed by the American Suppliers, Inc.; that the employees of the American Tobacco Company are performing work normally performed by employees of the American Suppliers, Inc. and that non-striking employees of the American Suppliers, Inc. are using equipment and plant of the plaintiff to perform functions normally performed at the American Suppliers, Inc.; they further state that all of the activities that the American Suppliers, Inc. are normally [fol. 53] performed and are now performed upon property completely controlled by the plaintiff herein.

IV

Defendants, General Drivers, Warehousemen and Helpers, Local Union #89, state that the situs of the dispute between members of the General Drivers, Warehousemen and Helpers Local Union #89, and the American Suppliers, Inc. is 1700 West Broadway; that the American Suppliers, Inc. is engaged in business there and that all picketing conducted against the American Suppliers, Inc. has been conducted within reasonable distance of the situs of dispute; that further they state that all picketing activities and activities related thereto have clearly disclosed that the dis-

pute sought to be advanced by the picketing is with the American Suppliers, Inc.

V

Defendants, General Drivers, Warehousemen and Helpers, Local Union #89, further state that the plaintiff should be denied relief in this court because it has repeatedly violated the orders issued by this court in that:

1. Plaintiff has permitted supplies and equipment destined for delivery to the American Suppliers, Inc. to be delivered to their dock at 1700 West Broadway.

2. Plaintiff has permitted egress and ingress through their entrances of employees of the American Suppliers, Inc. other than management and office personnel.

3. American Tobacco Company is operating plant and facilities of American Suppliers, Inc. with employees of the American Tobacco Co.

[fols. 54-116] 4. Plaintiff has wilfully misled the court in stating that the facilities of the American Tobacco Co. have not been used for delivery and shipping of materials in commerce with the American Suppliers, Inc.

Wherefore the defendant, General Drivers, Warehousemen and Helpers Local Union #89, having fully answered pray that the plaintiffs petition and Motion for Temporary Injunction be dismissed; prays for their costs herein and for all relief to which they might in equity be entitled.

(S.) Hardy & Logan and Robert W. Zollinger, Attorney for Defendant; General Drivers, Warehousemen & Helpers, Local Union #89.

[fol. 117] In Jefferson Circuit Court, Chancery Branch, — Division

[Title omitted]

Affidavit of Virgil A. Denton—Filed April 20, 1953

Affiant, Virgil A. Denton, being first duly sworn, deposes and says that he is an assistant business agent for General Drivers, Warehousemen and Helpers, Local Union #89,

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., assigned as his particular duties the representation of men in the City Pick-Up and Delivery Division; that as such he was informed on a restraining order to be issued by the Jefferson Circuit Court, Judge Macauley L. Smith; that he was aware that as a condition of such restraining order there was a provision that the American Tobacco Company would not receive shipments of unprocessed tobacco through their Broadway dock;

Affiant further states that on the morning of April 9, 1953, he received a call from Jack L. Berry of the Bowling Green Express Company, wherein it was discussed that a shipment of tobacco had been received from Bowling Green for delivery to the American Tobacco Company; that at such time he informed Mr. Berry that no tobacco could be delivered to the American Suppliers Company but that no deliveries to the American Tobacco Company were being halted; he states that Mr. Berry then informed him that men employed by him were refusing to deliver the tobacco;

[fol. 118] Affiant further states that he asked Mr. Berry why he did not secure trucks from the American Tobacco Company to come to the docks and pick the shipment up and take it back to 1700 W. Broadway, to which Mr. Berry replied that the men were refusing to unload the trailer; that he informed Mr. Berry that it was the duty of the men to unload the shipment on to the dock and that they could not refuse and that in the event of their refusal the Union would sustain their dismissal. Apparently Mr. Smith was standing beside Mr. Berry at the time of this conversation and that this suggestion was conveyed by Mr. Berry to affiant that the American Tobacco Company trucks back directly into the trailer and load it directly. At no time did the affiant inform anybody that shipments to the American Tobacco Company would not be delivered.

Affiant states that there is existing at the present time a contractual agreement between the employees through Local #89 and the Bowling Green Express Company providing for dismissal or reprimand for refusal to follow an order given by the employer, and that a copy of such agreement is attached hereto and made a part of this affidavit.

Affiant states that at no time since the shipment of tobacco was received by the Bowling Green Express has he been in communication with any of the employees of the said company.

Affiant states that as evidence of his abiding by the terms of the restraining order he is filing herewith and making a part hereto a letter received from R. L. McDonald of Huber and Huber Express Company, Inc., informing Mr. James Burns, an employee of said company, of his discharge. [fols. 119-119d] Affiant states that the discharge of James Burns was occasioned by the said Mr. Burns' refusal to deliver a shipment of goods to the American Tobacco Company and that upon being apprised of such refusal Local #89 has refused to intervene on behalf of the said James Burns.

Affiant states that he has taken every step that he has found it possible to make in order to assure compliance with the temporary restraining order issued in the above styled action.

Further affiant saith not.

(S.) Virgil A Denton.

Subscribed and sworn to before me by Virgil A. Denton this 18th day of April, 1953. (S.) Robert W. Zollinger, Notary Public, Jefferson County, Kentucky. My Commission expires July 13, 1954.

[fol. 119e] SECTION 3 OF ARTICLE II

(a) The Employer shall not discharge nor suspend any employee without just cause, but in respect to discharge must give at least one (1) warning notice of the complaint against such employee to the employee in writing, with a copy to the Union, except that no warning notice need be given to an employee before he is discharged if the cause of such discharge is dishonesty, drunkenness, use of alcoholic beverages while on duty, carrying of unauthorized passenger, too great an accident frequency, the instigation of or participation in a wild cat strike or slow down or refusal to perform his usual normal legitimate duties as di-

rected by management. Violation on the part of an employee of the rules and regulations as provided by municipal, state or federal laws or authorities as relating to motor transportation shall, among other things, be considered cause for disciplinary action on the part of the Employer, [fols. 119f-119bb] and shall subject the employee to temporary or permanent dismissal from employment.

(b) Discharge must be by proper written notice to the employee and the Union. Warning notices shall have no force or effect after nine (9) months from the date thereof. Any employee may request an investigation as to his warning notice, discharge, or suspension, and such request shall be handled as provided in Article III, Grievance Procedure.

(c) It shall not be considered a violation of this Agreement for employees covered hereunder to refuse to cross a picket line of a Union or refuse to handle unfair goods. The term unfair goods, as used in this section includes, but is not limited to, any goods or equipment transported, interchanged, handled, or used by any *carrier*, whether party to this Agreement or not, at whose terminal or terminals or place or places of business, there is a controversy between such carrier or its employees on the one hand and a labor union on the other hand; and such goods or equipment shall continue to be "unfair" while being transported, handled, or used by interchanging of succeeding carriers whether parties to this Agreement or not, until such controversy is settled.

[fols. 119cc-120] ARTICLE IX

Central States Area Over-the-Road Motor Freight

Agreement

Period covered ..... February 1, 1952
to January 1, 1955

Protection of Rights

"It shall not be a violation of this contract and it shall not be cause for discharge if any employee or employees refuse to go through the picket line of a Union or re-

fuse to handle unfair goods. Nor shall the exercise of any rights permitted by law be a violation of this contract.

The term "unfair goods" as used in this Article includes but is not limited to, any goods or equipment transported, interchanged, handled, or used by any carrier, whether party to this Agreement or not, at whose terminal or terminals or place or places of business there is a controversy between such carrier or its employees on the one hand, and a labor union on the other hand; and such goods or equipment shall continue to be "unfair" while being transported, handled or used by interchanging or succeeding carriers, whether parties to this Agreement or not, until such controversy is settled.

The Union agrees that, in the event the Employer becomes involved in a controversy with any other Union, the Union will do all in its power to help effect a fair settlement.

It is understood that in the event the decision of the National Labor Relations Board in the Conway case is sustained or prevails on appeal to the higher Federal Courts, this Article will be renegotiated and rewritten to provide the Union with the maximum of protection afforded by such decision."

[fol. 121] In Jefferson Circuit Court, Chancery Branch, Second Division

The American Tobacco Company, Inc., Plaintiff,

vs.

General Drivers, Warehousemen and Helpers, Local Union #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., Is the Authorized Representative for the Purpose of Collective Bargaining of Employees of American Suppliers, Inc., Defendants

Opinion—Filed April 22, 1953

Since the morning of March 30th this Union and its members and associates have been on strike and have maintained

picket lines at, or adjacent to, the plant of American Suppliers. On April 6th, at the insistence of the plaintiff herein, American Tobacco Company, Inc., a restraining order was issued enjoining certain acts upon the part of the Union, and specifically prohibiting the Union from maintaining pickets at the Broadway entrances to plaintiff's property at 17th and Broadway and from refusing, through its members, to make deliveries of property shipped to the plaintiff or to induce or encourage others from making deliveries of such property.

The plaintiff professes to be a stranger to the labor dispute between defendants and American Suppliers, although it is admitted that the last named corporation is a wholly owned subsidiary of plaintiff. Locally the two Corporations are indeed separately administered. Mr. John G. Hager is the Branch Manager of The American Tobacco Company, and Mr. W. B. Turner occupies a similar position with American Suppliers. Neither takes orders from the other, although they, of course, cooperate with each other. [fol. 122] The superiors of both are in the Home Offices of the two Corporations at points outside of Kentucky. Since it is not denied, it must be presumed that somewhere in a higher echelon, perhaps as high as the Board of Directors of the parent Corporation, common control is exercised over all elements of both Corporations, including the two local organizations. The physical layout of the plants is significant. In the local telephone directory both American Tobacco Company and American Suppliers are listed as being located at 1700 West Broadway in this City. The plant of American Suppliers is, loosely speaking, located in the middle of an industrial area, all of which is owned by The American Tobacco Company, indeed, the ground upon which American Suppliers' plant was erected is owned by American Tobacco and leased to American Suppliers. American Suppliers' plant cannot be entered without crossing property owned by and under the control of American Tobacco. American Suppliers pays American Tobacco rental for the use of its property, but no witness could state the terms of the lease or whether there is a written lease. Except where the various factory buildings about the perimeter of the plant area, a high fence serves to enclose it. Thus the whole property, including American

Tobacco and American Suppliers, appears to the casual observe- as the plant area of one industrial owner. No fence separates American Tobacco from American Suppliers.

American Suppliers buys raw tobacco, puts it through initial processing, sells it to American Tobacco, which further processes it into marketable products of cigarettes, etc. Mr. Turner testified that the entire output of American [fol. 123] Suppliers is purchased by American Tobacco. A Conveyor belt connecting the two plants delivers the processed tobacco from American Suppliers to American Tobacco.

Indicative of how closely enmeshed are the operations of the two Corporations is the undenied fact that a truck owned and operated by the American Suppliers displays an advertisement of Lucky Strike Cigarettes, a well known product of American Tobacco. Moreover, a building of American Suppliers located at 7th and Arcade, (not involved in this injunction proceeding except incidently), has a sign over its entrance "American Tobacco Company."

Occasionally employees of American Suppliers do work for American Tobacco, although when they do a record is kept and American Tobacco pays American Suppliers for such services. Employers of American Suppliers for several months now have been receiving four packages of American Tobacco cigarettes as part of their weekly compensation. Separate cafeterias are maintained for the employees of the two Companies, and recently separate first aid facilities were established. If, however, an employee of American Suppliers is seriously injured or takes seriously ill, he or she is sent to the American Tobacco Hospital, there being no such facilities at American Suppliers' plant.

Much testimony was heard to the effect that certain gates, or entrances, were normally used by American Suppliers employees and certain others by employees of American Tobacco, but at least one gate certainly was available to be used commonly by employees of both Corporations. The parking lot is also used by both Corporations. The power plant supplies steam to both Corporations, although Amer- [fol. 124] ican Tobacco renders statements according to "flow meter" readings to American Suppliers for the amount of steam that Corporation uses.

Under this set of facts the Union contends that its picketing against American Tobacco is primary and not secondary picketing.

At the outset the picketing was not peaceful. There was much testimony relative to the vulgar and insulting language used by pickets to other employees crossing the picket lines. Among other things, Union members are accused of having called those crossing the picket lines "hound dog". In a spirit of levity the Union insisted in Court that the term "hound dog" was not used as an insult but rather insisted that the pickets were merely repeating the words of a popular song, allegedly one of the current favorites on the radio. The Court would be inclined to accept this explanation if it were not for the fact that "hound dog" was one of much milder insults that the Union members were accused of employing. The Court is satisfied from the testimony that much stronger and much more vulgar and vituperative language was freely indulged in by the pickets.

Worse, however, than the language were acts of violence indulged in by the pickets. The Court is convinced that there was shoving and tripping of other employees. There was mass picketing. Auto tires of other persons were punctured. Ice picks were used. Roofing nails were scattered in driveways. On a few occasions bricks were hurled. Some damage, including a broken flood light, was caused. One truck had all four tires slashed. This conduct is inexcusable.

In addition there is evidence that the strike has been conducted in an atmosphere of threats.

[fol. 125] With this factual background, the Court is confronted with two serious legal issues. First, the Union contends that the Taft-Hartley Act vests the N. L. R. B. and Federal Authority with exclusive jurisdiction to enjoin picketing which amounts to a secondary boycott and, therefore, claims that this Court is without jurisdiction. Counsel cite a California case, Gerry of California vs. Superior Court, 194 P. (2d) 689, and a Minnesota case, Norris Grain Co. vs. Nordaas, 46 N. W. (2d) 94. Both involved acts amounting to secondary boycotting. In holding that the Federal Authority was exclusive, the California Court specifically based its opinion on the fact that the "Union objective and

the means employed to attain it were not unlawful insofar as the law of this State is concerned". The only challenge made against the Union activity was that it violated the Taft-Hartley Act.

The Minnesota case was a writ of prohibition proceeding in which the State Court was prohibited from proceeding with an injunction restraining the Union from engaging in picketing which amounted to a secondary boycott. Both the National Labor Relations Act and the Minnesota Act contained provisions outlawing secondary boycotts. The Court held that the Federal Act vested exclusive jurisdiction in the N.L.R.B. to enforce the provisions against secondary boycotting.

It does not appear that any contention was made before the Minnesota Court that State Courts have the power to protect the private property of the State's citizens against any otherwise unlawful acts committed against such private property. The only unlawful acts complained of were the secondary boycott acts, which were claimed to be unfair [fol. 126] labor practice contrary to both Minnesota and Federal law.

In the situation before this Court, counsel for the Union insists that, if the acts of the Union in picketing American Tobacco are unlawful in any way, they are unlawful only because they constitute a secondary boycott, and they, therefore, must come within the exclusive jurisdiction of the N.L.R.B. With this the Court cannot agree.

If the Union pickets American Tobacco when it has no dispute whatsoever with American Tobacco, (conceding for the purpose of this discussion that American Tobacco is a stranger to this labor dispute), and by so doing coerces or influences persons not to make deliveries of needed merchandise and material to American Tobacco, the American Tobacco Company is placed in position to suffer irreparable damages. A wrong has been committed against it for which there should be a remedy. It may be that wrong constitutes a secondary boycott which could give rise to a remedy under the Taft-Hartley Act. But that wrong also constitutes a violation of Kentucky law in a field not covered exclusively by the Federal Act. It is violative of the Kentucky Constitutional provisions, which seek to protect the private property of our citizens and also con-

trary to K.R.S. 336.130, not necessarily because it is a secondary boycott but because it is an unfair and illegal act calculated to cause irreparable damage to plaintiff.

The Court is fortified in its opinion by the recent opinion of the Court of Appeals in the Blue Boar Cafeteria Co. vs. Hotel and Restaurant Employees, 254 S. W. (2d) 335. There the question of the right peacefully to picket was held not to be exclusively a Federal question controlled [fol. 127] alone by the Freedom of Speech Amendment to the Federal Constitution, but, rather it was held to be determined by the public policy of Kentucky as announced in K.R.S. 336.130 and as interpreted by the Courts. This holding was in keeping with several decisions of the Supreme Court of the United States, cited in the opinion of the Blue Boar case. It is true that the Blue Boar case did not involved interstate commerce. However, in the opinion of this Court, the interstate commerce of plaintiff would deprive this Court of jurisdiction only if the sole basis of this Court's asserted jurisdiction was that the acts constituted a secondary boycott. Lay aside for the moment the issue of American Suppliers being a wholly owned subsidiary of American Tobacco. In the absence of that issue, the acts committed by the Union against American Tobacco would amount to a wrong against American Tobacco whether or not they also constitute a secondary boycott.

Numerous cases were cited by plaintiff sustaining the right of state courts to exercise traditional police power to suppress violence, protect property, etc. The following quotation from Erwin Mills vs. Textile Workers Union of America, C.I.O., 67 S. W. (2d) 372, 234 N.C. 321, is a clear statement of the function of the state courts in these matters:

> "In our opinion there is nothing in the provisions of the Taft-Hartley Act or in the decisions of the Supreme Court of the United States in construing the provisions thereof that interferes with the right of a State to exercise its traditional police power to suppress violence, to prevent breaches of the peace, to prevent an employer and his employees from being intimidated by [fol. 128] violence or the threat of violence or to protect property and to safeguard its lawful use during a strike or labor dispute. The proper exercise of such

power does not impinge upon the lawful rights of labor within the purview of the Constitution of this State, the Constitution of the United States, or the Taft-Hartley Act."

The other legal question arises from the American Tobacco Company's claim to be a total stranger to the labor dispute between the Union and American Suppliers. To support this claim, plaintiff relies upon the separate entities of the two Corporations and cites two cases involving labor matters, one the case of N.L.R.B. vs. Timken Silent Automatic Co., 114 F. (2d) 449 and State vs. Casselman, 205 P. (2d) 1131, an Idaho case.

It is not believed that the Timken case is authority on the issue here involved. There, the N.L.R.B. was attempting to enforce one of its orders against a subsidiary corporation and the court held that, in the absence of a showing that the parent corporation controlled the subsidiary in such manner as to bring about a wrong or a fraud, the two corporations could not be treated as one. The question there was the enforcement of an order against a corporation. It did not involve the question of whether the picketing of a parent corporation amounted to a primary rather than the secondary picketing. Even in the situation there considered, a strong dissenting opinion was written. The Idaho Court affirmed a conviction of pickets for engaging in secondary picketing contrary to an Idaho Statute. There, two subsidiary corporations of American Telephone and Telegraph Co., The Mountain States Telephone and Telegraph Co., and the Western Electric Company, both had labor disputes with different Unions. The Telephone Company settled its dispute, and the union of the Electric Com- [fol. 129] pany continued to picket the Telephone Company. Prosecution ensued.

It was contended by the Union that the picketing was primary and not secondary, because both Companies were wholly owned by American Telephone and Telegraph and, therefore, the corporate veil should be pierced. The Idaho Court held otherwise, pointing out that the operation of the two corporate entities was not shown to be a subterfuge or an invasion. The Court relied on the fact that Western Electric had been organized in 1881 and sold its products

in other fields than that engaged in by the Telephone Company and it also sold them throughout the United States, while the Telephone Company involved operated in only seven states.

The Court pointed out that both Unions and Employers recognized that the two labor disputes against the two different Companies were separate and distinct disputes. In making ultimate settlement of both labor disputes, both Unions and Employers treated and recognized the disputes as distinct from each other.

We do not have a similar situation here. The strike is not yet settled, and far from recognizing that American Tobacco is not a party to its dispute, the Labor Union is strenuously claiming that it is such party.

The Idaho Court also pointed out that it was stipulated therein that the parent Company, American Telephone and Telegraph had no power to represent the subsidiary and, hence, "no power to bind or control them, and the separate settlements show the constituent unions acquiesced in this. If the parent had no control, the subsidiary would have had even less over another subsidiary". The Idaho Court pointed out that these two subsidiaries were part of a [fol. 130] total of twenty-three corporate subsidiaries of the parent, American Telephone and Telegraph.

We do not have that situation here. It is true that Mr. Hager manages American Tobacco and Mr. Turner manages American Suppliers and locally have no control over each other. But, as pointed out above, it must be presumed that, since American Suppliers is a wholly owned subsidiary, in some higher echelon there is a common control over the local offices of both Corporations.

The right of a union to conduct a strike is a powerful weapon in its hands. The Taft-Hartley Act, other Federal Laws, and the laws of the Commonwealth of Kentucky all tend to sustain the right of the Union so to strike. Unquestionably, here the Union has the right to strike against American Suppliers as the primary employer of the Union. To hold that picketing American Tobacco Company would be secondary picketing rather than primary picketing solely on the ground that the two Companies have separate corporate entities might well serve to deprive the Union of the powerful weapon which our laws intend to preserve.

In 16 A.L.R. (2d) at page 778, the annotator discussing the effect of community of interest between primary and secondary employers upon the legality of an alleged secondary boycott, makes these very pertinent remarks:

> "An important factor in determining whether the activities of a union against an employer other than the one with which the union has a labor dispute come within the purview of the secondary boycott, is the relationship between the two employers. If the relationship is so close that one may be regarded as the [fol. 131] ally of the other, picketing of the one may be permissible during a labor dispute with the other."

An interesting case is that of Douds vs. Metropolitan Federation of Architects, 75 F. Supp. 672. That case involved the construction of Section 8 (b) (4) A of the Taft-Hartley Act, as applicable to a strike conducted by the union recognized by Ebasco Corporation, during which the union also picketed a partnership known as Project, which subcontracted much of Ebasco's work. Although the Corporation and partnership had no common ownership of any kind, the Court held the picketing to be primary rather than secondary. While it is true we are not here construing the Taft-Hartley Act, the Douds case is authority for the proposition that mere differences of legal entities, such as these two different corporate structures are not conclusive of the question of neutrality in a labor dispute. The District Judge had this to say on this question:

> "I am unable to hold that corporate ownership or insulation of legal interests between two businesses can be conclusive as to neutrality or disinterestedness in a labor dispute".
>
> And,
>
> "To suggest that Project had no interest in the dispute between Ebasco and its employees is to look at the form and remain blind to substance".

Unquestionably, American Tobacco is interested in American Suppliers' labor dispute. Geographically the two Companies are so closely enmeshed as to make it almost impos- [fol. 132] sible to separate them. Ownership of the two

Companies is identical. The only thing that separates the two Companies is corporate entity. In the opinion of this Court, this fact does not constitute American Tobacco a neutral or a total stranger in this strike. American Tobacco rather is an ally of American Suppliers.

In the case of Whitt vs. Stephens, 246 S. W. (2d) 996, the Court of Appeals of Kentucky refused to consider the opening of a new draft mouth in a seam of coal by the same owner to be such a different operation as to deny the right of the union men to picket the newly opened entrance, although the union had had a contract with the owner concerning the former entrance to this seam of coal only. Thus, identity of ownership has been considered by our Court of Appeals in a labor dispute, although the question of corporate entities was not considered.

In Boyd vs. Deena Artware, 239 S. W. (2d) 86, our Court of Appeals held that a union could picket not only the plant of the employer, but also the area immediately adjacent to the plant upon which an independent contractor was erecting a new plant for the employer. It might be said that in that case the Court of Appeals implied that, if the independent contractor had been seeking to enjoin the picketing and if such independent contractor could have established himself as a complete stranger to the labor dispute, the Court may have enjoined the picketing. As stated above, however, under the facts of this case, American Tobacco cannot be considered a complete stranger to the labor dispute.

It is, therefore, the opinion of the Court that the Union has the right peacefully to picket American Tobacco. Since the testimony in this case had disclosed that the picketing in this case has not been conducted in a peaceful atmosphere, an injunction should be granted but in different terms from [fol. 133] the restraining order. The number of pickets will be limited. All violence will be enjoined. Threats of injury and reprisal will be enjoined. Use of abusive language will be enjoined. Counsel will meet with the Court to discuss the exact terms of the injunction.

Contempt Proceeding

Along with the hearing on the injunction, the Court also heard a rule for contempt against various members of the

Union. This contempt arose out of the alleged refusal of certain members of the Union who were employed by the Bowling Green Express Company to handle merchandise for delivery to American Tobacco Company. The restraining order prohibited the members of the Union and its associates "from refusing or inducing, encouraging, or otherwise causing or arranging with, the employees of other employers, particularly common carriers, or with such employers to refuse to accept, handle, transport and deliver in accordance with their legal and contract obligations property shipped by or to plaintiff."

The seven employees of the Bowling Green Express Company attempted to excuse their conduct in failing to make deliveries by saying that they had not "directly" been asked to handle the merchandise until the morning of the day they testified in Court. The Court is convinced that, whether or not these seven members were directly asked to handle this goods for delivery to American Tobacco Company, all seven of them understood that they were being asked indirectly to handle the goods. The seven also professed to have had no knowledge of the restraining order that had been issued in this action. It is difficult for the Court to believe that these men had no knowledge whatsoever of the restraining order. It is true [fol. 134] that several of them testified that they didn't know what a restraining order was, but the Court feels that these seven men knew that some sort of Court Order existed and further knew enough about that Court Order to realize that it required them to make deliveries. The effect of their claimed ignorance of the restraining order is completely lost to them by reason of the fact that on the morning of the day on which they testified in Court, after knowing that a restraining order was in existence, these men defiantly and admittedly again refused to handle the deliveries.

The Court has already dismissed the contempt rule against Paul Priddy, Stoy Decker and Marion N. Winstead, for the reason that no testimony directly involved these three men in the disobedience of the Court's order. In addition to the seven employees of the Bowling Green Express Company, Virgil Denton was also accused of contempt. He was called over the telephone by Mr. Berry of the Bowling

Green Express Company and asked for assistance in getting the employees of Bowling Green Express to make the deliveries. Mr. Denton did not testify in Court but filed an affidavit explaining his conduct. The Court is not convinced from that affidavit that Mr. Denton had no part in encouraging the refusal to handle this goods for delivery to the plaintiff. He may not have directly refused or directly coerced, but he at least indirectly encouraged or induced the refusal. As Assistant Business Agent for the Union, it is believed that if Mr. Denton had acted as he should have under the circumstances the deliveries would have been made.

As it turns out, the Court is of the opinion that the restraining order was erroneous in that it went too far and [fol. 135] *in that it went too far and* in that it was based upon the theory that American Tobacco Company was a stranger to the labor dispute. Restraining orders, however, are necessarily issued in haste in order to prevent irreparable injury. Under certain circumstances restraining orders may be issued by a clerk in the absence of a judge of a court. Whether issued properly or erroneously, restraining orders must be obeyed. If improperly issued, the right place to correct the mistake is in Court. Persons affected by the order cannot take the law into their own hands and assume to disobey a court order. Consequently, it is the Court's judgment that Robert Smith, Charles Moore, Delmar Hightower, Jacob Lee, Jr., Christopher Evans, Ernest Spencer, Fred Ham and Virgil Denton are guilty of contempt and each is fined the sum of $30.00. No fine is levied against the Union in regard to these contempts for the reason that, although these persons may have acted in behalf of the Union in committing their individual contempts, there is considerable evidence that in regard to the delivery of other goods to the plaintiff the Union Officials strictly adhered to the restraining order.

(S.) Stuart E. Lampe, Judge.

[fol. 136] In Jefferson Circuit Court, Chancery Branch, Second Division

The American Tobacco Company, Inc., Plaintiff,

vs.

General Drivers, Warehousemen and Helpers Local Union #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., Is the Authorized Representative for the Purpose of Collective Bargaining of Employees of American Supplier, Inc., Defendants

Memorandum Opinion on Terms of Injunction—Filed April 23, 1953

• • •

The Court having authorized picketing of American Tobacco Company as well as American Suppliers, Inc., the plaintiff insisted that the temporary injunction heretofore issued requiring members of defendant Union, who were also employees of common or contract carriers, to continue to make deliveries to the plaintiff without discrimination.

Plaintiff insists that the threatened action of the members of the Union who are so employed to refuse to make deliveries to it is violative of K. R. S. 281.685 wherein a common carrier (similar provisions are also had for con-[fol. 137] tract carriers) is enjoined against subjecting any person to any unreasonable discrimination, and the penalty provisions of the same chapter, which in effect provide that any person who causes, aids or abets any violation of the above is doing an unlawful act.

Counsel for the Union insists that to require the members of the Union to make these deliveries in spite of their contract agreement to the contrary would amount to involuntary servitude and also a violation of the Taft-Hartley Act.

On the authority of the above mentioned provisions of the Statute, and on the authority of these two cases considering similar statutes, Burlington Transport Co. vs. Hathaway, 12 N.W. (2d) 167, an Iowa case, and Turner vs.

Zanes, 206 S.W. (2d) 144, a Texas case, the Court is of the opinion that appropriate language should be contained in the permanent injunction restraining any unlawful discrimination.

(S.) Stuart E. Lampe, Judge.

In Jefferson Circuit Court, Chancery Branch, Second Division

The American Tobacco Company, Inc., Plaintiff,

vs.

General Drivers, Warehousemen and Helpers Local Union #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an Unincorporated Labor Union, et al., Defendants

Judgment—Entered April 23, 1953

[fol. 138] At a Court held on April 22, 1953:

The Court, having considered the entire record herein, heard proof offered by both parties in open court, and considered further proof offered by affidavits and exhibits, and arguments of counsel, and being advised, rendered a written opinion on April 21, 1953, which is hereby made part of the record,

And the parties agreeing that the order heretofore issued herein on April 6, 1953, and denominated a "Restraining Order," having been issued upon notice and after hearing; may be considered a temporary injunction rather than a restraining order for all purposes of this action,

And the parties further agreeing that all the proof herein, including affidavits, may be considered by the Court as evidence upon the plaintiff's motion for a permanent injunction, as well as upon its motion for a temporary injunction and defendants' motion to dissolve the same, both of which agreements are hereby made a part of the record herein,

And the Court being of the opinion that the said tempo-

rary injunction, presently in effect should be modified, and a permanent injunction issued in lieu thereof, upon the terms hereinafter set out, and plaintiff and defendants all having advised the Court, as is now and hereby certified, that each of them desires to appeal to the Court of Appeals from the judgment modifying said temporary injunction and granting said permanent injunction,

It is ordered, that the temporary injunction heretofore in effect may be and hereby it is, modified and made into a permanent injunction, upon the following terms:

[fol. 139] **Permanent Injunction**

That the defendants, General Drivers, Warehousemen and Helpers, Local Union #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an unincorporated labor union; Paul W. Priddy, Joseph Burrell, Stoy Decker, Willard Marples, James Mallory, Alma Harper, individually, and as representatives of a class consisting of members of General Drivers, Warehousemen and Helpers, Local Union #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an unincorporated labor union, and each of them, and all members of said unincorporated labor union, and their confederates and associates, may be and hereby they are permanently enjoined:

1. From picketing or maintaining pickets or attempting to picket or maintain pickets at or about plaintiff's premises in excess of three pickets on each side (North, East, South, and West) plus one picket captain, making a maximum of thirteen persons at or about plaintiff's premises and within two hundred (200) feet thereof at any time;

2. From causing or threatening injury to the persons or property of the employees of plaintiff, or the physical property of plaintiff;

3. From using abusive, vile, profane, or threatening language to plaintiff's employees or others seeking to enter or leave plaintiff's premises or to do business with plaintiff;

4. From causing, aiding or abetting any common carrier or contract carrier unreasonably to discriminate

[fols. 140-142] against plaintiff by refusing while remaining an employee thereof, or inducing, encouraging, coercing or otherwise causing or arranging with common or contract carriers or any persons connected therewith to refuse to accept, handle, transport, and deliver, in accordance with their legal and contract obligations, property shipped by or to plaintiff, so long as property is being handled, transported and delivered by or to other customers of such contract or common carriers.

Provided, however, that for a period of twenty days from this date, to-wit, until May 12, 1953, at 5:00 o'clock P.M., or such earlier time as the Court of Appeals may order otherwise, the temporary injunction aforesaid of April 6, 1953, may be and hereby it is continued in force upon its original terms, and the terms of this permanent injunction shall be and become binding upon the dissolution or modification of said temporary injunction, unless the Court of Appeals shall order otherwise.

So long as said temporary injunction remains in force, the bond heretofore given by plaintiff herein shall remain in effect. To all of which the Plaintiff and Defendants object and except and pray in appeal to the Court of Appeals which is hereby granted.

(S.) Stuart E. Lampe, Judge.

(S.) Stites, Wood, Helm & Taylor, Counsel for Plaintiff.
(S.) Hardy & Logan, Counsel for Defendants.

[fol. 145] In Jefferson Circuit Court, Chancery Branch, — Division

[Title omitted]

Affidavit—Filed April 27, 1953

Affiant, J. D. Wilson, being first duly sworn, states that he is Manager of Middlewest Freightways, Inc., a common carrier by motor truck, with its Louisville headquarters at 1660 West Hill Street, Louisville, Kentucky; that on Monday, April 20, 1953, said carrier was requested by the American Tobacco Company, Inc., to pick up a shipment

to be carried to Kansas City, Missouri; that affiant directed Louie Leffew and J. C. Wilson, who are truck drivers employed by said carrier and members of General Drivers, Warehousemen and Helpers, Local Union #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an unincorporated labor union, to take a truck of said carrier to the factory of American Tobacco Company, at 17th and Broadway, in Louisville, Kentucky, and pick up said shipment; that said Leffew and Wilson took said truck and called the Union Hall of General Drivers, Warehousemen and Helpers, Local Union #89, International Brotherhood of Teamsters, Chauf- [fol. 144] feurs, Warehousemen and Helpers of America, A. F. of L., an unincorporated labor union, and requested advice as to whether or not they should pick up said shipment; that thereafter they did not pick up said shipment, but returned to the depot of said carrier without doing so and refused to pick up said shipment.

Affiant further states that at the time said truck drivers were requested to pick up said shipment, they were acquainted with and on notice of the restraining order heretofore issued in the above styled action on April 6, 1953.

(S.) J. D. Wilson.

Subscribed and sworn to before me by J. D. Wilson, this 23 day of April, 1953. (S.) John C. Klumb, Notary Public, Jefferson County, Kentucky. My commission expires Jan. 13, 1955. (Seal.)

[fol. 145] In Jefferon Circuit Court, Chancery Branch, Second Division

The American Tobacco Company, Inc., Plaintiff,

vs.

General Drivers, Warehousemen and Helpers, Local Union #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an Unincorporated Labor Union, et al., Defendants

Judgment on Rule—Entered May 4, 1953

[fol. 146] At a Court held on May 4, 1953:

The Court having considered the record herein and having heard proof offered by both parties in open court with respect to the Rule issued herein against General Drivers, Warehousemen and Helpers, Local Union #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an unincorporated labor union; Paul Priddy, Stoy Decker, Marion N. Winstead, Virgil Denton, Robert Smith, Charles Moore, Delmar Hightower, Jacob Lee, Jr., Christopher Evans, Ernest Spencer and Fred Ham, and being advised, having rendered a written opinion on April 21, 1953, which has heretofore been made part of the record,

It is ordered and adjudged that the Rule heretofore issued herein against General Drivers, Warehousemen and Helpers, Local Union #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an unincorporated labor union; Paul Priddy, Stoy Decker, Marion N. Winstead, Virgil Denton, Robert Smith, Charles Moore, Delmar Hightower, Jacob Lee, Jr., Christopher Evans, Ernest Spencer, and Fred Ham, be made absolute as to Virgil Denton, Robert Smith, Charles Moore, Delmar Hightower, Jacob Lee, Jr., Christopher Evans, Ernest Spencer, and Fred Ham, and that they, and each of them, is guilty of contempt of Court, and each of them is fined the sum of Thirty Dollars ($30.00) therefore; that said individuals and each of them shall make good his fine to the Commonwealth by the payment of said sum

of $30.00 within one week from the entry of this judgment, or shall be confined in the County Jail of Jefferson County, Kentucky, until the fine aforesaid shall be paid.

[fol. 147] It is further ordered and adjudged that the Rule as to General Drivers, Warehousemen and Helpers, Local Union #89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., an unincorporated labor union; Paul Priddy, Stoy Decker, and Mation N. Winstead, be dismissed.

(S.) Stuart E. Lampe, Judge.

[fol. 148] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 1-48] In Jefferson Circuit Court, Chancery Branch

Transcript of Evidence

John G. Hager called and testified in behalf of the plaintiff, being first duly sworn, was examined and deposed as follows:

Direct examination.

By Mr. Helm:

1 Q. Mr. Hager, will you give your name and position to the Court, please?

A. My name is John G. Hager and I am the Branch Manager of the Louisville Branch of the American Tobacco Company.

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[fols. 49-69] 21 Q. Mr. Hager in what state is the American Tobacco Company incorporated?

A. I think it is incorporated in the State of New Jersey.

22 Q. Do you know in what state American Suppliers, Incorporated, is incorporated?

A. I am not sure, I think maybe it is in the State of Delaware.

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[fol. 70] 89 Q. Now, Mr. Hager, I will ask you whether this picketing by Local 89 has caused any injury, loss, or expense to American Tobacco Company and, if so, the nature and extent of that?

A. Well, it is very complex—hard to answer.

Mr. Zollinger: I think the witness will be incompetent to testify, if it is speculative.

Witness: Your Honor, I would like to answer it.

Court: Let's hear the witness.

[fols. 71-73] A. Well, it caused us to completely revise our whole handling of all raw materials entering our property and shipping of all of our finished goods, and that compromises shipment of merchandise all over the United States. All of our materials and supplies come in normally, on about a fifty fifty basis; fifty percent of them probably coming in by Interstate Truck and the balance of them in railroad cars and of course due to the fact that the drivers were either members of the Teamsters Union or sympathetic to their cause, they refused to cross the picket lines so we were forced to ship by rail, and in many instances that caused an inconvenience, a longer haul and cost money. In addition to which, we had to employ more people, and we have had to do things that we normally wouldn't do in every day business, and I would say that the cost of all of it, if added up, would be a terrific amount of money, many thousands of dallars. How much, I don't know.

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[fol. 74] 107 Q. Who decides how much rent the American Suppliers pay the American Tobacco Company?

[fols. 75-93] A. That was determined in our New York office between the two companies.

108 Q. Who owns the stock of the American Suppliers?

A. I don't know exactly. I think the American Tobacco Company is the principal owner.

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[fol. 94] J. L. BIERY a witness called and testified in behalf of the plaintiff, being first duly sworn, was examined and deposed as follows:

Direct examination.

By Mr. Helm:

1 Q. Mr. Biery, will you give the reporter your full name, please?

A. J. L. Biery.

2 Q. What do you do?

A. Terminal manager for Bowling Green Express.

3 Q. Is that a common carrier motor truck?

A. Yes, common carrier.

4 Q. Do you have on your premises a shipment of tobacco for the American Tobacco Company?

A. Yes, sir, I do.

5 Q. Where did that come from, if you know?

A. From The American Tobacco at Nashville, Tennessee.

[fol. 95] 6 Q. Where is it addressed to?

A. To The American Tobacco Company at Louisville, Kentucky.

7 Q. At 17th and Broadway?

A. At 17th and Broadway plant.

8 Q. When did that shipment come in to your terminal?

A. It arrived in Louisville on the morning of April 9th.

9 Q. On that morning, did someone of The American Tobacco Company request that you deliver it?

A. Yes, sir. Mr. George Lody, the district traffic manager called me for delivery.

10 Q. What did you do?

A. We attempted to get it delivered, and at my instructions Henry Miller, who was acting foreman at the time, presented the bill covering the load to one of the tractor drivers, and he refused it. . . .

Mr. Zollinger: If the court please, will you instruct the witness to testify as to what he knows of his own knowledge.

Court: Just testify to that which you know of your own knowledge. You cannot testify as to what someone told you.

[fol. 96] A. I was informed. . . .

Mr. Zollinger: Objection.

Court: Sustained. You cannot testify as to what a third person told, unless that person is a party to this action.

(Off record remarks.)

Mr. Helm: You can testify as to what was told you by any person a member of Local 89.

A. I was told that none of the boys will take the load.

Mr. Zollinger: Objection.
Court: Sustained.

11 Q. Who told you that, Mr. Biery?

Mr. Zollinger: The objection has been sustained.
Mr. Helm: I am trying to bring out the fact that the man who told him is a member of Local 89.
Court: Objection overruled.

A. I will answer this way, Mr. Lody called and asked. . . .

Court: Who is Mr. Lody?
[fol. 97] Witness: He is district traffic manager of the American Tobacco Company.
Court: You cannot testify what he told you.
Witness: He called me for the load.

12 Q. What did you do after that?
A. I went back on the platform and wanted to know why the load was not out for delivery, and I was told by the acting foreman. . . .
13 Q. Is he a member of Local 89?
A. I believe he is, yes, sir.
14 Q. Do you know for sure that he is a member of Local 89?
A. Yes, he is.

Mr. Zollinger: Let the witness identify these people.

5 Q. Who were you talking to?
A. I was talking to Henry Miller, who was acting foreman and a member of Local 89.

Court: Mr. Zollinger, is Mr. Miller a member of Local 89?
Mr. Zollinger: Yes.
Court: Proceed, Mr. Witness.

A. (Cont.:) I then called Mr. Lody back and told him——
[fol. 98] Mr. Helm: Just a minute, you were going to tell about what happened between you and Henry Miller.

A. (Cont.:) Henry Miller told me that the load had been refused by the men who usually drive the tractors. This happened to be a trailer load.

Mr. Zollinger: I want to make a further objection.

(Off record remarks.)

Court: He can answer as to what he told him.

A. After I was told that no driver would take that load out, I contacted my steward, Mr. Bob Smith, who was at the time loading or unloading. He was at the Huber and Huber dock.

16 Q. Is he a member of Local 89?

A. Mr. Smith is a steward and a member of Local 89.

17 Q. Go ahead.

A. I asked Bob about this thing, and I said how come that we couldn't get that load delivered, and Bob told me that they could not deliver it, that there was labor trouble over at the American Tobacco Company, and there were general statements about unfair goods or hot goods or [fol. 99] something. I don't remember exactly what was said, and I told Bob at the time, I said, "Now, these people are calling for that load and they want it, and I want to know why it can't be delivered", and he said, "Well, the men can't touch it." So then I called the hall. I told Bob I was going to call the hall.

18 Q. What do you mean by the hall?

A. The Union hall.

19 Q. Local 89?

A. Yes, sir. I called the hall, and I got ahold of Mr. Denton.

20 Q. Who is he?

A. Mr. Denton is a business agent who we deal with, have been dealing with Mr. Denton for quite some years, and I asked Mr. Denton at the time what was going on, how come we couldn't get the load delivered, and Mr. Denton told me they were having labor trouble. He said the men were not going to touch it, and then I asked him about the possibility of American Tobacco Company coming over and

picking it up, and I was told that the men were not going to touch it. He said to me in the statement, and I told Virgil at the time, I said, "Virgil, whatever you tell me I [fol. 100] am going to tell American Tobacco, because I have got to get myself off the hook. We are a common carrier. We have got to make an attempt to deliver." Virgil said, "Well, the men are not going to touch it, but you can tell them this, that if American Tobacco wants to come over and pick up that shipment, they can do so", and I relayed that information to Mr. Lody.

21 Q. What happened after that?

A. That was about all for that day, and the next morning when I got down to the office, I had a phone call waiting again from Mr. Lody of The American Tobacco Company, and he questioned me again about the load, and I said, "Well, I don't know." I said, "I will go back and find out." I got hold of Bob Smith, the steward, member of Local 89, and Bob came into my office, and I talked to Bob about it, and he told me that nothing had changed, that that was that, and I said, "Well, why can't we handle it?", and he said, "Well, we just can't handle it", and I said, "On whose orders? American Tobacco Company wants to know who." He said he was told that at the hall, and I said, "Who at the hall?", and Bob said he didn't know. I said, "Well, let us get hold of the hall and find out", and then the conversation took place, and Bob handed me the [fol. 101] telephone, and he was talking to Virgil Denton. Mr. Denton talked with me, and then when I was satisfied that we weren't going to make any delivery, I asked Virgil about the possibility of unloading the trailer. I had a trailer tied up, and I thought I might need it, and Virgil said, "Well, I think we can arrange that", and I said, "Well, will you tell Bob that?", and he said, "Yes", and then I handed the phone to Bob, and after the conversation was concluded Bob told me that if we wanted it unloaded that he would, and I said, "O.K., I will see the foreman and see if he needs the trailer", and that concluded that day's work on the load. That happened to be a Friday. Nothing was done Saturday on it, because normally they don't work, and we just have a skeleton crew in to handle emergencies and what pick-ups we have to handle. Then this thing

started all over again Monday morning, and Mr. Lody called and wanted to know about this load, and he recited to me the fact that there was an order out, and I told him that I knew about that and I had told the men—that is, Bob Smith and also to Virgil, I mentioned about this court order, and I said, "You fellows have got me in the middle on it." I said, "Here is a man that says he doesn't have [fol. 102] labor trouble, he doesn't have a picket line, and there is a court order out, and he wants delivery and I can't do anything for him. What is the dope this morning?", and Bob told me then that there wasn't anything changed on it, and I don't remember who I got the information from, but . . .

Court: What date was this?

Witness: This was a Monday.

Court: What Monday?

Witness: April 13th, this past Monday.

A. (Cont.:) There were a lot of rumors flying around about deliveries or pick-ups or something being made over at American Tobacco, so I got in my car, and I went over, and there was a Craig trailer backed in American Tobacco, so I came back and I thought, well, maybe the thing has changed, and I checked again on the situation, and I contacted the hall and I got hold of the Union hall and got hold of Mr. Denton again and asked Mr. Denton about this thing, and I said, "Now, if these other lines are going in, it looks like we ought to be able to go in", and if I recall correctly, Virgil said to me, "That was unauthorized. We are not taking picks on you or any other line, that the situation is still the same." So I let it go at that. I gave that information to Mr. Lody. During the day then these [fol. 103] rumors kept flying about everybody getting into American Tobacco except us, and I did personally see Commercial Motor over there, and later on in the afternoon I saw some kind of a red tractor without identification pulling a Cochran Foil trailer, and some time later, about the time he pulled out, there was a Huber and Huber truck come in there. So, I called my foreman, and I asked my foreman, I said, "When Bob comes in, ask him what is going on." I said, "It looks like everybody is getting into

American Tobacco except Bowling Green Express", and when I got back into the office, Bob was there with Mr. Stoay Decker. They were in my office and were using the telephone, and I don't know anything about the conversation, but I started talking to him about the problem I had with this load of tobacco sitting in the yard, and Bob was there too, and the conversation went on about how come the other lines were getting in and so forth, and he said, "Well, you all can make deliveries."

22 Q. Who said that?

A. Mr. Stoay Decker said it. He said, "Well, there is nobody telling them not to make it", and I said, "Well, there has been." I said, "Mr. Denton told me that the boys could not handle that load", and Mr. Decker said, "Well, [fol. 104] that must be a mistake, because we are not telling anybody not to go in there", and I said, "Well, Bob, I guess we can make delivery." Bob kind of laughed, and he went on out. I wasn't expecting him to perform a miracle, but Mr. Decker did tell me, he said, "Well, I will take that up tonight and see what I can do for it." I said, "Well, I will sure appreciate it." I said, "It will get me off the spot." I said, "They have been wanting that load, and I can't do anything about it." But the next morning, which was yesterday morning, the load was still there, and I went back and had the acting foreman, Mr. Miller, present the bill to Mr. Smith and ask him if they could make a delivery on it, and he said no, nothing had changed, and Mr. Lody was informed of that. He asked for the load again yesterday, and nothing had changed on it. This morning I instructed Miller to put the bill out again or ask about it, and he asked about it, and nothing had changed. Now that is where I sit the load. When I was there, about eleven o'clock this morning, the load was still sitting back there in the lot where it was spotted, to my knowledge, the first day it come in. That is all I know about it.

23 Q. You have named Henry Miller, a member of Local [fol. 105] 89, as your assistant dock foreman, Bob Smith, a member of Local 89, as your dock steward. What other members of Local 89 are involved in what you have been telling us?

A. The tractor drivers, that are normally set out as

tractor drivers, are Bob Smith, Charlie Moore, Elmore Hightower, Jacob Lee, Jr., Christopher Evans, Ernest Spencer, and Fred Ham.

24 Q. Have you ever asked any of these men personally to deliver this merchandise?

A. No, sir, I have not, other than my conversations with Bob. Normally that function is performed by the foreman.

25 Q. Is that customary in your business?

A. It is at my place of business. I never give direct orders to the men.

Mr. Zollinger: At this time, Your Honor, I make a motion to strike all of his testimony with respect to the Union.

Court: As a member of the Union, I am going to permit it.

Mr. Zollinger: Exceptions, Your Honor.

26 Q. Mr. Biery, in your conversations with Denton, did he say anything to lead you to believe that the Union had [fol. 106] ordered these men not to handle this goods.

A. Well, the statements that I gave you I made a note of, and if I recall, the first day he specifically said there was labor trouble down there, and the men are not going to touch it, because the first day we could not get it loaded on the dock. It remained in the trailer, but the second day, when Mr. Denton said there would be no deliveries, I did ask him about getting that trailer unloaded if we needed it, and I said, "then if American Tobacco wants to pick it up off the dock, they can, and we will have our trailer." Then he made the arrangements there, apparently with Mr. Smith, to do it, because Bob told me he would do it if we wanted it, but we didn't need the trailer. It is still sitting down there.

27 Q. Did Denton tell you anything about possible trouble that the Union would cause to your men if they handled this shipment?

A. No, he made no reference to any trouble.

28 Q. Mr. Biery, what do you know, with respect to whether your men were advised of the restraining order in this case, when they found out about it, if they did?

[fol. 107] A. Well I was not at the office at the time that the restraining order was served. My chief clerk, Jim Tackett, accepted the order for me, and that is all I know

about the restraining order, the original order that came out, the restraining order. I was told that the . . .

Court: Sustain the objection.

29 Q. Were you told, or did you have any conversations with your men who were members of Local 89 as to whether they knew of the restraining order or not?

A. I called Bob Smith's attention to the restraining order when I asked him about delivering the load.

30 Q. When did you do that?

A. On each occasion when I contacted him about delivering the load, or asked him about the change, or why couldn't we get it delivered, I repeated the conversation that Mr. Lody put on me that there was no labor trouble and that there was a restraining order out.

31 Q. Did you ever talk to Mr. Winstead at the Union Hall about this matter?

[fol. 108] A. Yes. The first morning that this trouble came up—I think it was the first morning. I can tell you pretty quick—yes, after I had talked to Bob, I called the Union Hall, and I got hold of Mr. Winsted first, and I told him that I was trying to get hold of somebody about this situation, and he said that he would look into it and call me back, and in a few minutes, five or ten minutes, Mr. Denton called me back.

32 Q. Mr. Winsted was at the Union hall when you talked to him?

A. Yes, sir. I had no general conversation with him, other than trying to get hold of somebody who could tell me what was what.

Mr. Helm: That is all.

Cross-examination.

By Mr. Zollinger:

33 Q. Mr. Biery, there is a provision in the contract which you have with the Teamsters Union, is there not, that the members of the Teamsters Union cannot be required by the order to pass through any picket line?

A. Yes, sir, that is correct.

[fol. 109] 34 Q. Without reference to whose picket line it is?

A. It is a general statement, if I recall it correctly.

35 Q. The members of your work force are pretty generally advised of that condition in the contract, are they not?

A. I assume they are.

36 Q. They remind you of that, don't they?

A. Well, we have never had too much trouble with it, sir. Usually if there is a picket line, we don't request the men to go over it. They tell us that there is a picket line at such and such a place, and we let it go at that. We call the people and tell them the freight is there, and that is it.

37 Q. You had a personal conversation with Mr. Story Decker——?

A. Yes, sir.

38 Q. (cont.)—at which time he advised you that there must have been a mistake, that nobody was being stopped from going across there, is that correct?

A. Yes, sir, that was his conversation. I believe that was Monday or Tuesday he told me that.

[fols. 110-115] 39 Q. And that was after you had observed trucks of all companies going into The American Tobacco Company property?

A. Yes, sir, that was Monday, I believe.

40 Q. Yet you yourself were depending entirely on what your assistant foreman told you, with respect to refusal of delivery?

A. That is normal procedure with me.

41 Q. None of these men refused to you to handle it?

A. No, sir, not directly, no, sir. It is not my duty. I never contact the men directly to send them out on loads or anything, but I hire these other people for it, that is what I hire these other people for.

Mr. Zollinger: That is all.

(Witness excused.)

[fol. 116] GEORGE J. LODY a witness, called and testified in behalf of the plaintiff, being first duly sworn, was examined and deposed as follows:

Direct examination.

By Mr. Helm:

1 Q. Will you give the reporter your name and your position?

A. George J. Lody, district traffic manager at American Tobacco Company.

2 Q. You have held that position for over a month, I take it?

A. Yes, sir.

3 Q. Are you familiar with a shipment of tobacco sent from American Tobacco Company at Nashville to The American Tobacco Company at 17th and Broadway in Louisville via Bowling Green Express a few days ago?

A. I am.

4 Q. Do you know when that shipment arrived at the Bowling Green Express depot here?

[fol. 117] A. Well, I telephoned Mr. J. L. Biery on the morning of April 9th to determine whether or not the shipment had arrived and when it was going to be delivered, and he told me that it had . . .

Mr. Zollinger: Object.

Court: Sustained.

(Off record remarks.)

Witness: I don't know then. It had only what he told me.

5. Q. Did you ask him to deliver that to you that day?

A. I did.

6 Q. Did he deliver it?

A. He did not.

7 Q. Have you requested the delivery of that tobacco on any subsequent day, and if so, what days?

A. I requested it on the 10th, and I requested it on the 13th and on the 15th.

8 Q. That is today?

A. Yes, sir.

9 Q. And has it ever been delivered?

A. It has not.

10 Q. Have you talked to anybody else at Bowling Green Express regarding this shipment?

[fol. 118] A. I have not.

11 Q. I will ask you whether any other truck line, common carrier, has refused to accept any shipment offered by American Tobacco Company, or refused to deliver any shipment to The American Tobacco here since this strike began on March 30th?

A. There have been others.

12 Q. Tell us what you can about those cases, who you asked to do it and what happened?

A. Well, we had one case with the Federal Express.

13 Q. What happened, that you know of, in that case?

A. In that particular case, I telephoned their dispatcher, Mr. Rankin, and asked him to send a truck to our company for—to pick up a shipment going to Detroit.

14 Q. Did they send a truck?

A. He sent the truck about 9:45 A. M. on the 7th of April. The truck pulled into our yard on Broadway, and the driver came into the plant and asked to get at a telephone to call his hall and his boss. That truck left, and in the meantime I called and talked to Mr. Atterbury, the terminal manager, and he sent the truck back that after-[fol. 119] noon about 12:30, and we loaded that truck out to Detroit that day.

15 Q. So you were delayed for two or three hours that morning in getting your load moved?

A. Yes, sir.

16 Q. Do you know whether the driver was a member of Local 89? The driver on the first occasion?

A. Yes, sir, he was.

17 Q. Were there any other occasions when your traffic was delayed or refused?

A. We have had quite a few cases, but Mr. McCrory is more familiar with those—my assistant—that I am.

18 Q. Did you offer shipments to the Huber and Huber truck line on the 30th of March?

A. We did.

19 Q. What happened?

A. We sent our truck out there with the shipments, and

they refused to accept them, and our truck was returned to the plant with the shipment. I telephoned Mr. Huber who is Vice President of Huber and Huber.

20 Q. Don't testify as to what he said. You can tell what you told him.

[fol. 120] A. I told him that our truck had been returned to the plant and asked him whether or not he was going to receive our shipments, and after he had talked to the Union, he said he could not accept them.

Court: The court will sustain what he said. You can testify as to whether or not any shipments were accepted.

Witness: They were not accepted.

21 Q. Has Huber and Huber accepted any shipments from you since?

A. Not to my knowledge.

22 Q. Mr Lody, do you know anything about two trailers, they were semi-trailers, from Kalamazoo that were parked in your lot for a while?

A. Yes, sir, they were parked there for several days.

23 Q. Tell the Judge what you know about that.

A. Well, those two trailers were parked there for——

24 Q. How did they get there in the first place, if you know?

A. They were brought in by the Sutherland Paper Company, and we unloaded the trailers, and I don't know who told the men that they couldn't pull them out, but never-

[fol. 121] theless they stayed there, and they didn't pull them out.

25 Q. What did the drivers of those trucks do with those truck trailers ?

A. What did they do?

26 Q. Yes, when they got ready to leave the first time, what did they do?

A. They went out and talked to the man at the gates and didn't pull the trailers, left them there. What transpired at the gates I do not know.

27 Q. Did they take their tractors away with them?

A. They took the tractors with them.

28 Q. And how long were those trailers left at your loading dock?

A. They were left there—I don't know the exact date that they pulled them out.

29 Q. Do you know whether it was after the 6th of April, a week ago Monday?

A. I believe it was.

30 Q. And do you know whether they had been there since the preceeding Monday, March 30th?

A. They had, yes.

Mr. Helm: That is all.

[fol. 122] Cross-examination.

By Mr. Zollinger:

31 Q. Mr. Lody, you said that the drivers of these trucks went to the gate and were talking to the man at the gate. Do you mean there was a picket line out there at that time?

A. At that time there was.

32 Q. In other words, the incidence you are talking about was before the restraining order came out?

A. That is correct.

33 Q. And the incident with respect to the Federal Express Company occurred early in the morning of April 7th, the day after the restraining order was issued and before the restraining order had been brought up and sent up?

A. That was the morning of the 7th. We had no pickets.

34 Q. You had no pickets there; the pickets were taken off?

A. That is right.

35 Q. But you didn't see a copy of the restraining order before the 8th or 9th, did you?

[fols. 123-143] A. I think that was the 8th.

36 Q. Immediately after you conferred with the Federal Express Company, a truck came down and moved it, isn't that correct?

A. They didn't move it until the afternoon. The first truck went back.

37 Q. The first truck went back early in the morning, but then they came and they were permitted to move it without any interference at all, isn't that correct?

A. They moved it in the afternoon, yes.

38 Q. And wasn't that the same driver that had been there in the morning?

A. That was the same driver.

39 Q. On the Huber and Huber incident, that occurred immediately after the restraining order was issued too, did it not?

A. That occurred on March 30th.

40 Q. That was when the picket line was still up, wasn't it, when the picket line was still there that they refused to deliver?

A. They didn't refuse to deliver. They refused to accept our shipments that we delivered to them with our own trucks.

. . . . . .

[fol. 144] THEODORE D. MCCRORY a witness, called and testified in behalf of the plaintiff, being first duly sworn, was examined and deposed as follows:

Direct examination.

By Mr. Helm:

1 Q. Will you give the reporter your full name and your position?

A. Theodore D. McCrory.

2 Q. And what is your position, Mr. McCrory?

A. Assistant district traffic manager.

3 Q. For American Tobacco Company?

A. For American Tobacco Company.

4 Q. Have you held that position for some time now?

A. Yes, sir.

5 Q. Mr. McCrory, I will ask you whether, since the 30th of March this year, you have had any shipments to or from American Tobacco refused or delayed or held up by any of the common carrier truck lines carrying them or asked to carry them?

A. Yes, sir.

6 Q. Tell the court in your own words what has occurred. Don't tell what anybody else told you but what has occurred [fol. 145] in that connection?

A. Well, the first day that we had the picket line, Silver Fleet refused to accept any of our shipments, said their men would not handle them, due to the picket line at our plant. We had inbound shipment on Huber and Huber, and the dock steward refused to release the shipment. We had the same at Ziffrin Truck Lines, and we had the same condition at C and D. The shipments came in, and they refused to deliver them. Clements Truck Line, they refused to pick up shipments, and deliver too.

7 Q. Are there any others that you know of?

A. I think that covers about all of them.

8 Q. How about the Crutcher Truck Lines? Did you have any hold up with them?

A. Well, it was Crutcher Brothers Drayage Company. They brought a shipment to the plant and returned it to the shipper.

9 Q. When did that occur?

A. Last Friday.

10 Q. Do you know why they brought it to the plant and returned it to the shipper?

A. The driver stated that he was afraid . . . .

11 Q. Don't say what the driver stated. Do you know [fol. 146] anything about what happened when they came to the plant?

A. They refused to come in because of the picket line on 17th Street.

12 Q. Were they asked to come in on 17th Street? Where were they supposed to come in?

A. On Broadway between 17th and 18th.

13 Q. Was there any picket line at that entrance?

A. No, sir.

14 Q. Did they come in there?

A. No, sir.

15 Q. Did they go to 17th Street?

A. Yes, sir.

16 Q. Do you know the name of that driver?

A. His name is Offutt.

17 Q. When he went to the 17th Street gates, were there pickets at those gates?

A. There was a picket line back at the gate.

18 Q. Do you know whether or not he crossed those pickets?

A. No, sir, I don't.

19 Q. What did he do after that?

[fol. 147] A. He returned the shipment to the shipper.

20 Q. So the American Tobacco has never received it?

A. No, sir.

21 Q. With respect to the Clements Truck Line, what occurred with respect to them?

A. We had three separate shipments at Clements Truck Line that the driver refused to deliver to us at The American Tobacco Company dock on Broadway between 17th and 18th, and there was no picket line on Broadway.

22 Q. On what day was that that he refused to deliver?

A. Friday.

Mr. Zollinger: If it please the court, I would like the witness to be admonished to restrain himself for that which he knows of his own knowledge.

Court: Mr. McCrory, you may testify to anything that you yourself saw happen. You may testify to anything that a member of the Union told you. You cannot testify to what other persons who are not members of the Union might have told you. That would be heresay. You can [fol. 148] testify to what members of the Union told you, because they are parties to this action.

23 Q. What was it happened on April 10th?

A. That was the day that they were to deliver the three shipments, and the driver refused to come in.

24 Q. Did he come to the Broadway gate?

A. No, sir.

25 Q. Did he come to the plant at all?

A. He went to the side of the plant.

26 Q. Do you know what he did there?

A. He stopped where the picket line was, and then he went up Anderson Street, but he came up Broadway and turned south on 17th and east on Anderson.

27 Q. Did he ever come in to unload at all?

A. No, sir.

28 Q. Did you call up Clements Truck Line again after that?

A. Yes, sir.

29 Q. Did you ask them to deliver this material?

A. Yes, sir.

30 Q. Did they deliver them?

[fol. 149] A. No, sir.

31 Q. Have they ever delivered them?

A. Not that I know of, no, sir.

32 Q. As far as you know, they are still in the hands of the Clements Truck Line and have been since the 10th?

A. Yes, sir.

3 Q. Do you know what these shipments consist of?

A. There are two separate shipments of machine parts and one shipment of two drums of spices.

34 Q. Are they addressed to The American Tobacco Company?

A. Yes, sir.

35 Q. Do you know who they are coming from?

A. Two shipments of machine parts are from the Molins Machine Company of Richmond, Virginia, and the two drums are from The American Tobacco Company of Richmond, Virginia.

36 Q. Has Clements refused to pick up any of your outbound shipments?

A. Yes, sir.

37 Q. When did that occur?

A. Monday.

[fol. 150] 38 Q. The 13th?

A. Yes, sir, refused nine shipments.

39 Q. That was nine separate shipments?

A. Nine separate shipments of cigarettes.

40 Q. Who did you talk to at the Clements Truck Line about that?

A. Mr. Peloff, the manager.

Mr. Zollinger: Objection. He is not a member.

Court: Sustained.

Mr. Zollinger: Let it be stricken.

41 Q. Tell what happened with respect to the shipment which you mentioned with the C and D Truck Line.

A. Those were shipments of cigarettes and smoking tobacco out of Cincinnati to our jobbers in Louisville. I talked to Mr. Downs, the manager up there. He said that he couldn't . . . .

Mr. Zollinger: Objection.

Mr. Helm: Don't tell what he said.

42 Q. They were shipments from Cincinnati from The American Tobacco Company at Cincinnati?
A. Yes, sir.
43 Q. They were addressed to whom?
A. To the various jobbers in Louisville.
44 Q. They were not addressed to The American To-
[fols. 151-223] bacco Company factory in Louisville?
A. No, sir.
45 Q. What happened with respect to those shipments?
A. They were eventually delivered.
46 Q. Were they brought to Louisville by the C and D?
A. Yes, sir.
47 Q. Do you know whether the shipping bills called for delivery to the various local jobbers by C and D?
A. Yes, sir.
48 Q. Did C and D deliver them on schedule to those jobbers?
A. No, sir.
49 Q. What did they do?
A. They were delayed.
50 Q. For how long?
A. At least a day.

Mr. Helm: That is all.

* * * * * * *

[fols. 224-228] Paul W. Priddy called and testified in behalf of the defendants, being first duly sworn, was examined and deposed as follows:

Direct examination.

By Mr. Zollinger:

1 Q. Please state your name?
A. Paul W. Priddy.
2 Q. Are you a member of the Teamsters Local No. 89??
A. I am.
3 Q. Do you have an official position with that organization?
A. I do.

4 Q. What is that position?
A. President.

* * * * * * *

[fol. 229] 24 Q. On the issuance of the restraining order against the Local on April 6th, this year, how long after that order was issued did the Union remove the pickets from the Broadway side?

A. Word was sent immediately.

25 Q. Has there been any picketing by the Teamsters Union at any time since then?

A. On 17th Street, but not on Broadway.

26 Q. What instructions were given after the issuance of that restraining order to the Union members who are employed by the freight carriers?

A. That we were going to abide by the restraining order in the full sense of the word and that as long as this restraining order was on, saying we could not have pickets on Broadway, that these employees working for the Freight Companies, had no choice except to deliver the merchandise.

27 Q. Has that order ever been countermanded by the Union at any time, to your knowledge?

[fol. 230] A. Not to my knowledge. If it has been, it has been contrary to all orders that I have issued since this strike started.

28 Q. Have you had a general membership fee since this strike started, did you not?

A. Friday of last week.

29 Q. At that time, are all of the members of the Union supposed to be present at that time?

A. A general meeting solicits, asks for all the members working at any part of our Union for any company, who can find available time, to please come to that meeting. This is a meeting in which all of our by-laws and which all of our rules of order and which all of our officers are elected—the general meeting.

30 Q. At that meeting, which was held since the strike took place, what instructions were given to the members of the Union with respect to the observance of the restraining order?

A. I presided as the Chairman of the meeting, and dur-

ing that meeting a complete history of our efforts to negotiate a contract, first to win bargaining rights, and then negotiate a contract for the American Suppliers people, were given. A complete history of the restraining order was [fols. 231-242] given to the membership by me, and with a direct order from me that no pickets being on Broadway, that was in compliance with the restraining order; that they can do nothing but deliver, and should deliver to the American Tobacco Company, as long as it was not American Suppliers.

Court: What was the date of that meeting?
Witness: Friday, this past, your Honor. April 10th.

31 Q. Between the time of the restraining order and the time of the meeting, were there any other meetings or general meeting at which the employees of the freight transfer lines were present?

A. From the time of the restraining order?
32 Q. Yes.
A. No. However, all paid employees of the Union, who are assistant business agents, and everybody who asked, and everybody we came in contact with, were told that without pickets being on Broadway, deliveries could be made and should be made.

* * * * * * *

[fol. 243] Stoy Decker called and testified in behalf of the defendant, being first duly sworn, was examined and deposed as follows:

Direct examination.

By Mr. Zollinger:

1 Q. Please state your name?
A. Stoy Decker.
2 Q. Mr. Decker, do you have any official connection with [fols. 244-247] Local 89?
A. I am assistant business agent, but I don't know if it is official.

3 Q. How long have you been assistant business agent?
A. Two years.
4 Q. As such, are you in direct charge of the strike at the American Tobacco Company?
A. Yes.

* * * * * * *

[fol. 248] 27 Q. Since the time of the restraining order, what have your instructions been with respect to supplies going to the American Tobacco Company?
A. My instructions since the restraining order has been that no picket or anyone else interferes with shipments consigned to American Tobacco Company entering on Broadway, because we have no pickets there.
28 Q. Have you had occasion at various times to instruct [fol. 249] drivers who have voluntarily refused to deliver?
A. Yes, I have.
29 Q. Will you tell the Court what those occasions were?
A. One occasion was with the Bowling Green Express, Robert Smith, along with Jack Berry. I was there on the afternoon of Tuesday, this week, and I was talking to Robert Smith and Jack Berry in Jack Berry's office. He wanted to know why he could not pick up or deliver merchandise to the American Tobacco Company when his competitors were.

Mr. Helm: There is a lot of hearsay in this.

(Off record remarks.)

Court: He can testify what they had to say.

A. (Cont.) It is not hearsay, I was there. I talked to both Mr. Smith and Mr. Berry at the same time. I told Mr. Berry there was no reason why he could not pick up or deliver merchandise, at American Tobacco Company any time after the restraining order was issued, because we had issued instructions at the meeting to all of the membership to make deliveries there, and that other truck lines were doing that, that there was no reason why his people could not pick up and deliver merchandise to the [fol. 250] American Tobacco Company.

30 Q. Have there been any other occasions when you have intervened?

A. Yes, sir, I told Mr. Smith of Huber and Huber to make deliveries and he did make a delivery.

31 Q. Any other occasions?

A. I cannot remember the man's name, but one from Husmann and Roper Company, I told him to make deliveries and he did make a delivery.

32 Q. You have been observing the different companies making deliveries there, have you not?

A. Yes, sir.

33 Q. Tell the court the names of the various trucking companies handling freight—deliveries to the American Tobacco Company?

A. Husmann and Roper; Clements Truck Lines have been in there but I don't know what they delivered; I don't know what any of them delivered, but I know they have been in there; Johnson Freight Lines, Federal Express, and I believe, Huber and Huber, not sure about them.

34 Q. Does Local 89 have contracts with all of these companies?

[fols. 251-253] A. Yes, they do.

* * * * * * *

[fols. 254-348] 54 Q. Have you known of any inducement, encouragement, coercion, or conspiracy with the employees of the freight lines, to cause them to refuse to deliver goods to the American Tobacco Company? m

A. Not after April 6th, if that was the date of the restraining order, not after that.

* * * * * * *

[fol. 349] MR. ROBERT SMITH called and testified in behalf of the defendants, being reminded he was still under oath, deposed as follows:

Direct examination.

By Mr. Zollinger:

1 Q. Mr. Smith, is there a trailer at the docks of the Bowling Green Express containing tobacco consigned to the American Tobacco Company?

A. Yes, it is back against the fence.

Mr. Zollinger: That is all.

[fol. 350] Cross-examination.

By Mr. Helm:

3 Q. Have you or any of the other employees of the Bowling Green Express been asked to handle the load of tobacco?

A. I was asked directly yesterday.

4 Q. You say you were asked indirectly?

A. I never was asked directly until yesterday.

5 Q. Until yesterday?

A. Yes, sir.

6 Q. Yesterday morning?

A. Yes, sir.

7 Q. Did you handle the load?

A. No, sir.

8 Q. Why not?

A. Because there was labor trouble there.

9 Q. You refused to handle it on those grounds?

A. Yes, that was yesterday.

10 Q. How about today?

A. I was asked this morning to handle it.

11 Q. Did you again refuse to handle it?

A. Yes.

[fols. 351-352] 12 Q. On account of labor trouble?

A. Yes.

13 Q. You are a member of Local 89?

A. Yes.

* * * * * * *

[fol. 353] Mr. Charles Moore a witness, called and testified in behalf of the defendants, being first duly sworn, was examined and deposed as follows:

Direct examination.

By Mr. Zollinger:

1 Q. What is your name?
A. Charles Moore.
2 Q. Where do you work, Mr. Moore?
A. At Bowling Green Express.
3 Q. You were cited to come here, I believe, and show why you should — be ruled in contempt, is that right?
A. That is right.
4 Q. Have you ever refused to haul a load of tobacco consigned to the American Tobacco Company?
A. I never was asked until this morning.
5 Q. On April 9th, did anybody ask you to haul the load?
A. No.
[fol. 354] 6 Q. Is there a load of tobacco consigned to the American Tobacco Company . . .
A. Suppose to be, I have not seen it.

Mr. Zollinger: That is all.

Cross-examintion.

By Mr. Helm:

7 Q. When was that rule for contempt served on you?
A. If I am not mistaken, I think it was Monday morning. I think that is when it was given to me.
8 Q. Are you sure it was not earlier than that?
A. It might have been. They did not find me when they were hunting for me, because I was out on a run.
9 Q. Were you asked this morning to handle that load of tobacco?
A. I was.
10 Q. What did you answer?
A. No.
11 Q. Why?
A. Because there was labor trouble down there, and the

rest of them would not do it, so I would not do it either.

12 Q. Were the others asked to handle it?

A. Yes, they were all asked this morning.

[fol. 355] That is the only time I heard all of them being asked.

13 Q. Did they all refuse to handle it?

A. Those standing right there said, "no", yes.

14 Q. When did you first hear something about a restraining order that required the handling of this tobacco?

A. I don't know if it was Monday or Friday, they were looking for the steward, but the steward was not in.

15 Q. You did hear something then about a restraining order requiring them to handle it?

A. There was something, but what it was, I did not pay that much attention to it.

16 Q. And you did not try to find out?

A. No, I didn't.

Mr. Helm: That is all.

* * * * * * *

[fol. 356] DELMAR HIGHTOWER a witness, called and testified in behalf of the defendants, being first duly sworn, was examined and deposed as follows:

Direct examination.

By Mr. Zollinger:

1 Q. Please state your name.

A. Delmar Hightower.

2 Q. Where do you live, Mr. Hightower?

A. 2412 Griffin.

3 Q. Are you employed by the Bowling Green Express Company?

A. That is right.

4 Q. Mr. Hightower, were you ever requested to haul a load of tobacco from the Bowling Green Express Company to the docks of the American Tobacco Company?

A. Not directly until this morning.

* * * * * * *

[fol. 357] By Mr. Helm:

8 Q. Now you say you were not asked directly to handle this load, what do you mean by that?

A. I knew the load was there last Thursday or Friday, some time, and they come out with it, but they never asked me directly to carry it.

9 Q. What do you mean by "they didn't ask me directly"?

A. They asked if anybody wanted the load, just like that, but they did not come direct to me to take the load.

10 Q. You heard them ask that?

A. Something like that.

11 Q. And you did not take the load?

A. No, sir.

12 Q. Did you refuse to take it?

A. No, I never refused to take it until this morning.

13 Q. Were you asked this morning to take it?

A. I was.

14 Q. What was your answer?

A. "No."

15 Q. Why?

[fol. 358] A. Because of the trouble they are having up there.

16 Q. You knew there was a restraining order in court, didn't you?

A. Like I told you, I heard of it over the week end.

17 Q. But you knew this morning that there was one?

A. I knew of it yesterday.

18 Q. Do you know whether or not there is any picket line in fornt of American Tobacco Company?

A. I don't think so now. I have not been around American Tobacco.

19 Q. As far as you know, there is no picket line?

A. Not in front.

20 Q. So that you would not have to cross the picket line to deliver.

A. I figure this way, the American Tobacco and the American Suppliers are all the same thing.

21 Q. So it was on account of the labor trouble at American Suppliers that you refused to deliver?

A. That is right.

22 Q. In spite of the fact there was no picket line?

[fol. 359] A. Like I told you, labor trouble, and I just don't cross a picket line.

23 Q. Have you talked to anybody at all about that?

A. No, I have not.

24 Q. Who have you talked to about it?

A. We talked amongst ourselves about it.

25 Q. Who do you mean "we"?

A. The bunch at the Bowling Green Express.

26 Q. All the truck drivers?

A. Yes.

27 Q. When did you do that?

A. Maybe this morning, I don't remember the exact time.

28 Q. That is the first time you talked about it?

A. Well you know how things go around, you will talk.

29 Q. It has been there since last Thursday, has it not?

A. It came in Wednesday or Thursday, I don't know the exact date.

30 Q. And there has not been any talk about it until this morning?

[fols. 360-379] A. I have not talked so much about it because I was not interested.

31 Q. Have you heard any talk about it before today?

A. Sure.

32 Q. Who was saying that tobacco should not move?

A. Nobody.

33 Q. Did Bob Smith tell you that it should not be moved?

A. Bob Smith or nobody told me it should not move.

34 Q. But still you refused to handle it this morning?

A. That is right.

35 Q. Didn't you know that Local 89 wanted it moved?

A. I knew they did.

36 Q. You did?

A. Yes.

Mr. Helm: I have another question here.

* * * * * * *

[fol. 380] Mr. John G. Hager called and testified in behalf of the plaintiff, having been reminded he was still under oath, deposed as follows:

Direct Examination

By Mr. Helm:

1 Q. Mr. Hager, has any change occurred since yesterday when we were in court, in your relations with your employees, and if so what?

A. Yes, sir, the Firemen and Oilers have gone back to work.

* * * * * * *

[fols. 381-383] 5 Q. Has your plant been operating with reasonable efficiency since the strike started?

A. It was interfered with materially, during the strike.

6 Q. In what way?

A. We had difficulty getting our people in, and also our materials and supplies and tobacco.

7 Q. Was that because of the pickets on Broadway?

A. Materially so, yes.

8 Q. After the pickets were taken away, did you have any special difficulty in operations?

A. No, not so much.

* * * * * * *

[fols. 384-390] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 391] IN COURT OF APPEALS OF KENTUCKY

GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL UNION #89, ET AL., Appellants

vs.

THE AMERICAN TOBACCO COMPANY, INC., Appellee

JUDGMENT—June 2nd, 1953

The Court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed on both the original appeal and the cross appeal; which is ordered to be certified to said court.

It appears to the Court that an emergency exists in this case and a mandate shall issue forthwith without prejudice to the right to file a petition for rehearing.

It is further considered that the appellee recover of the appellant, its cost herein expended.

[fol. 392] IN COURT OF APPEALS OF KENTUCKY

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION #89, ET AL., Appellants

vs.

THE AMERICAN TOBACCO COMPANY, INC., Appellees

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division, Honorable Stuart Lampe, Judge

OPINION OF THE COURT BY JUDGE STEWART AFFIRMING ON THE APPEAL AND ON THE CROSS-APPEAL—June 2, 1953

Two questions are presented for determination on this appeal and cross-appeal:

1. Are the pickets around the property of the American Tobacco Company, herein referred to as "American," at 17th and Broadway Streets in Louisville, involved in primary or secondary picketing, since the strike is con-

ducted at the same address against American Suppliers, Incorporated herein called "Suppliers"?

2. May a driver of a common or contract carrier be compelled against his wishes by injunctive process to cross a picket line advertising a lawful strike, when the driver is a member of the same union that is conducting the strike but he is not on strike himself?

We have chosen to consider the cross-appeal, or question No. 1, first.

[fol. 393] On March 30, 1952, Local Union No. 89 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America of the American Federation of Labor, hereinafter referred to as "Local 89" for the stake of brevity, called a strike against Suppliers and threw picket lines around four of its establishments, viz.: A redrying plant at 9th and Magnolia Streets; an office with a small warehouse attached at 908 South 8th Street; a group of warehouses at 7th Street and Arcade Avenue; and a "stemmery" situated upon American's property at 17th and Broadway Streets. Suppliers is a subsidiary of American, but it is not a party to this appeal.

It is the picketing on all sides at the last mentioned location that is the bone of contention. The stemmery is situated on ground owned by American and is completely surrounded by American's cigarette factory, its auxiliary structures and its fences. American maintains that its main gates are on Broadway and that they are not and have never been used for ingress and egress of either personnel or materials of Suppliers except to some small extent. On the other hand it states that access can be had to Suppliers for all purposes from 17th Street. It is therefore perfectly practical, American argues, to set aside the entire side on Broadway for its exclusive use and thereby prevent it from becoming entangled in the labor dispute that exists only between Local 89 and Suppliers. Furthermore, American, asserts it is engulfed in this controversy solely because of its corporate and geographical relations with Suppliers, but that there is not now and there has never been any affiliation between its employees and Local 89, so that it is being subjected to a secondary boycott by the conduct of the union, and that the sphere of picketing can and should

be restricted to the disputants in such a manner as to relieve it from damaging results that flow therefrom. Local 89 takes the position that the picketing is primary, proper [fol. 394] and legal. The Chancellor adopted the view of Local 89, and American has cross-appealed from the judgment in this respect. Accordingly, we must search the record to resolve whether this finding has a reasonable basis in the evidence.

We have mentioned the physical layout of the stemmery. Aside from this, American and Suppliers have an economic interdependence; or, it might be said that Suppliers is the child of American, its parent, because the latter owns all the capital stock in the former. Suppliers buys raw tobacco and puts it through a certain process at the stemmery. The tobacco is then transported from the stemmery to American's cigarette factory by means of a conveyor belt which runs from one to the other. Suppliers sells all its tobacco to American. It was brought out that American owns not only the land but the improvements employed by Suppliers in the operation of the stemmery. There was testimony that Suppliers leased the ground and the plant and paid rent to American for the use of the same; however, the terms of the lease and the amount of the rent were unknown to the local officials of either corporation. A central power plant on the property supplies steam to the facilities of both corporations, Suppliers paying for this service. The trucks of Suppliers carry advertisements of "Lucky Strike," a well-known manufactured product of American. Over the entrance of another plant of Suppliers at 7th and Arcade Streets, which is not immediately connected with this litigation, the name on the sign reads: "American Tobacco Company." At times employees of Suppliers work for American and the latter pays the former for such services. Employees of Suppliers also receive four packages of American made cigarettes as a part of their weekly compensation. If an employee of Suppliers is badly injured or becomes seriously ill, that person is sent to American's hospital for treatment. To sum up, Suppliers and American operate as a unit, except that each is a corporate entity and each is under separate [fol. 395] management locally.

In the light of the foregoing factual background, we are confronted with this question: Is American a neutral in the existant dispute between Suppliers and Local 89? The test to be applied in arriving at a proper conclusion on this point may be thus stated: "An important factor in determining whether the activities of a union against an employer other than the one with which the union has a labor dispute come within the purview of the secondary boycott provision is the relationship between the two employers. If the relationship is so close that one may be regarded as the 'ally' of the other, picketing of one may be permissible during a labor dispute with the other." See 16 A. L. R., 2d, paragraph 6, page 6. However, we are not without precedent on this subject in this jurisdiction.

In the recent case of Local 181, etc. v. Broadway and Fourth Avenue Realty Company, Ky., 248 S. W. 2d 713, a strike involved a corporation which owned and operated the Brown Hotel and the Kentucky Hotel and another corporation which owned and operated the Martin Brown Building, all located in Louisville. Both corporations were, except for qualifying shares, entirely owned by Mr. Graham Brown. In this opinion, in passing on a centempt proceeding, we not only treated the whole controversy as a single labor dispute but we considered Mr. Graham Brown and the two corporations as in reality one and the same. There we said:

> "Supporting the conclusion that this is in the broad sense one labor dispute, is the fact that when the strike first commenced, picketing was begun at the Martin Brown Building, as well as the two hotels, although at that time there was no claim of a labor dispute affecting the employes of the Martin Brown [fol. 396] Building.
>
> "In the eyes of the public, this has been a strike against Mr. Graham Brown, and the acts of violence have been committed by persons having a labor dispute with Mr. Brown."

We think the industrial alliance between Suppliers and American is so close that both may be considered as one operation. From the standpoint of physical setup the two

are so enmeshed that they cannot be split apart without doing violence to both. To suggest that American has no interest in the dispute between Suppliers and Local 89 is to look at the form and remain blind to the substance. Nor can the naked claim of corporate separability be raised as a bar to picketing the primary employer at 17th and Broadway Streets. To remove the pickets from any side of this property would be to remove them from Suppliers at that location. It cannot, therefore, be said that American is a neutral under the circumstances and that the picketing amounts to a secondary boycott at the above address. We conclude that the Chancellor correctly disposed of this issue.

Local 89 seeks by its appeal to nullify so much of the injunction as requires a driver of a common or contract carrier to cross against his will a picket line where a strike is in progress. It so happens in this instance that the carrier employees are members of the same union as those conducting the strike against Suppliers. It should be emphasized, however, that they refuse to handle freight for American while remaining in the service of their employer.

The rule of law that common carriers and their employees must serve all members of the public without discrimination is firmly established in Kentucky and, so far as we can find, in all the states. Its origin goes far back into the common law. Section 196 of the Constitution of Kentucky [fol. 397] embodies the principle in this language: "Transportation of freight and passengers by railroad, steamboat or other common carrier, shall be so regulated, by general law, as to prevent unjust discrimination. No common carrier shall be permitted to contract for relief from its common law liability." Subsections 1 and 2 of KRS 281.685 read in part that no common or contract carrier shall "subject any person to any unreasonable discrimination." KRS 281.990(1) stipulates that any person who "violates, or causes, aids or abets any violation of, any of the provisions of this chapter." which includes KRS 281.685 (1) and (2), "Shall be fined not less than fifteen dollars nor more than two hundred dollars, or imprisoned for not more than thirty days or both."

The foregoing doctrine is set forth at length in 9 Am.

Jur., Carriers, section 286, pages 607-608, and in 13 C. J. S., Carriers, section 27, pages 61-62.

In Burlington Transp. Co., v. Hathaway (Iowa, 1943), 12 N. W. 2d 167, a suit was brought by certain common carriers as plaintiffs against the teamsters, chauffeurs, warehousemen and helpers union and its business agents as defendants to enjoin the latter from requiring employees of the union to refuse to handle the goods of John Blaul's Sons Company, a wholesale grocery company in Burlington, Iowa, which the union was attempting to organize. A picket line had been thrown around the grocery company and the employees of the union refused to transport freight for the grocery company. The Iowa statute as to non-discrimination by carriers is similar to Kentucky's. The substance of the court's decision is as follows:

> "When the plaintiffs obtained their permits to operate as common carriers, they undertook the duty to transport the freight which the public tendered to them for transportation. The failure to carry out [fol. 398] this duty to transport would not be excused by showing that its employees refused to obey the employers' order. See Chicago B. & Q. R. Co. v. Burlington C. R. & N. Ry. Co. et al., C. C., 34 F. 481, and Consolidated Freight Lines, Inc., et al. v. Department of Public Service, et al., 200 Wash. 659, 94 P. 2d 484, 485. In the last cited case a strike of laundry workers at the Davenport Hotel in Spokane resulted in a picket line around that hotel. Certain common carrier truck lines, who had been serving the hotel in the capacity of picking up freight or baggage and delivering it anywhere in the State of Washington or in the channels of interstate commerce, refused to send their trucks through the picket line at the hotel because the local manager of the teamsters' union threatened to call a strike of the carriers' drivers if they were permitted to go through the picket line. The hotel filed a complaint with the Department of Public Service against the carriers for the cancellation of their permits as common carriers. This resulted in an order suspending temporarily the permits under which the carriers operated. Upon appeal the action of the Commission

was affirmed, the Supreme Court of Washington stating: 'The question then arises whether the appellants were excused by reason of the law. They being common carriers, it was their duty, under the facts and [fol. 399] circumstances of this case, to send their trucks through the picket line. 13 C. J. S., Carriers, p. 407, sec. 202; Moore on Carriers, 2d Ed., Vol. 1, p. 124; Chicago, B. & Q. R. Co. v. Burlington, C. R. & N. Ry. Co., C. C. 34 F. 481; Burgess Bros. Co. v. Stewart, 112 Misc. 347, 184 N. Y. S. 199.'

• • • • • • •

"From the above it is clear that if the plaintiffs were to do that which the union sought to compel them to do, namely, not handle the Blaul merchandise, they would be doing an act prohibited by the common law and the statutory law of this state and an act that could subject them to criminal prosecution.

• • • • • • •

"There was no labor dispute between plaintiffs and their employees or between plaintiffs and the defendant union. The union cannot concertedly exert, in aid of their labor dispute with Blaul, any economic pressure to compel these plaintiffs to do that which the law and public policy forbid. The injunction was rightly issued."

These cases support the rule laid down in the Hathaway case: Pacific Gamble Robinson Co. v. Minneapolis & St. Louis R. Co., (D. C. Minn., 1952) 105 F. Supp. 794; Northwestern Pacific R. Co. v. Lumber & Sawmill Workers Union, etc., (Cal., 1948) 189 Pac. 2d 277; Turner v. Zanes, (Tex., 1947) 206 S. W. 2d 144.

[fol. 400] Counsel for Local 89 admit that the Hathaway case correctly sets forth the law on the issue raised by the appeal as of the date it was decided, namely, in 1943, but they insist that the Labor-Management Relations Act of 1947, commonly called the Taft-Hartley Act, 61 Stat. 136 (1947), 29 U. S. C. A., Sec. 151 et seq. (Supp. 1952), makes the question under discussion one exclusively con-

trolled by the above enactment. To fortify this position, reliance is had upon this part of 29 U. S. C. A., Sec. 158, also known as 8 (b) (4) (D), which is as follows: "• • • provided, that nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer) if the employees of such employer are engaged in a strike ratified or approved by representative of such employees whom such employer is required to recognize under this sub-chapter."

We do not agree with this line of reasoning. Section 8 (b) (4) (A), (B), (C) and (D) of the Labor-Management Relations Act of 1947 was clearly intended to outlaw only a secondary boycott, and such is not involved in the issue under consideration. See Picketing-Free Speech. Tanenhaus, Cornell Law Quarterly, Fall, 1952, Vol. 38, No. 1, pages 1 to 50; and see also the statement of Senator Taft in 93 Cong. Rec., Page 4198. Nor does the above quoted provision purport to make lawful any act which aside from the statute in question is unlawful. The appeal here involves the refusal of employees of carriers who happen to belong to Local 89, the bargaining representative of Suppliers' employees, to transport the merchandise of American through the picket line at 17th and Broadway Streets, and this disobedience is not complained of as an unfair labor practice but as a violation of the common law, the constitutional law and the statutory law of Kentucky. More than that, the illegal conduct of the employees could subject them to criminal prosecution. It follows [fol. 401] that the portion of the injunction requiring performance of the duty to carry American's goods in no way impairs the right to strike, the right to picket or any other right guaranteed by the federal law or the Constitution of the United States.

Finally, the employees of the carriers rely upon a provision of the agreement between themselves and their employers covering the period from February 1, 1952, to January 31, 1955, to the effect that it shall not be a violation of their contract of a cause for discharge to refuse to go through the picket line of a union or to refuse to handle unfair goods. They insist that this stipulation excuses them from serving

American. The legal duty of a common carrier to handle the merchandise of a shipper without discrimination existed long before the contract came into being, and, by like token, employees of common carriers, as long as they voluntarily remain in the hire of their employer, do not have the lawful right to withhold their services from a particular customer who deals with their employer. Where the common carrier and its employees seek by a contractual provision to avoid the responsibility imposed by statute, such a contractual provision is void. Such is the case here.

The question of whether a contempt has been committed is left for the Chancellor's determination. Our reason for this ruling is that the contempt, if any, is continuous in its nature and it should not be handled piecemeal. Besides, the chancellor is on the ground, is familiar with the background of this suit and is in a better position to hear the evidence; therefore, this phase of the case can be more expeditiously handled for all concerned in the lower court.

It appears to us that an emergency exists in this case and a mandate shall issue forthwith without prejudice to the right to file a petition for a rehearing.

The judgment is affirmed on the appeal and on the cross-appeal.

[fols. 402-405] Attorneys for Appellants: Hardy & Logan, 506 W. Jefferson St., Louisville, Kentucky; Robert Zollinger, Realty Building, Louisville, Kentucky.

Attorneys for Appellees: Nelson Helm, Stites, Wood, Helm & Taylor, Kentucky Home Life Bldg., Louisville, Kentucky.

[fol. 406] IN COURT OF APPEALS OF KENTUCKY

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION No. 89, et al., Appellants,

versus

THE AMERICAN TOBACCO COMPANY, INC., Appellee.

PETITION FOR REHEARING—Filed August 13, 1953

Ralph H. Logan, Marshall B. Hardy, Hardy & Logan, 506 West Jefferson Street, Louisville, Kentucky; Robert Zollinger, Citizen's Building, Louisville, Kentucky; Warren E. Hall, Jr., Counsel for Southern Conference of Teamsters, Atlanta, Georgia; David Previant, Counsel for Central Drivers Council, Milwaukee, Wisconsin, Attorneys for Appellants.

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* * * * * * *

[fol. 440] **Proposition of Law No. 4**

A State Court Is Without Jurisdiction to Enjoin the Employees of Carriers From Refusing to Handle Freight of a Shipper Involved in a Labor Dispute Under the Circumstances of the Instant Case.

A. With respect to carriers operating under certificates of convenience and necessity issued by the Interstate Commerce Commission:

(1) The Interstate Commerce Commission has exclusive original jurisdiction to determine the reasonableness of the failure of the carrier to furnish services.

A basic and controlling decision substantiating this proposition is that of *Loomis v. Lehigh Valley Railroad Company*, [fol. 441] 60 L. Ed. 517, 240 U. S. 43. In this case the Supreme Court of the United States made clear that prior resort to the Interstate Commerce Commission is an absolute condition precedent to the right to have a court determine the lawfulness of the failure of a carrier to perform a statutory duty. We will refer to this case at greater

length in a later discussion of actions in State courts. There can be no doubt that the general rule with respect to this question is that there must be prior resort to the administrative tribunal for a determination of the administrative question involved.

In *Great Northern* v. *Merchants Elevator Company*, 259 U. S. 285, Justice Brandeis, speaking for the Court, said:

> "Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be a preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative, in contradistinction to judicial. But ordinarily, the determining factor is not the character of the function, but the character of the controverted question and the nature of the inquiry necessary for its solution. To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the inquiry is essentially one of fact and of discretion in technical matters, and uniformity can only be secured if determination is left [fol. 442] to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts."

A further decision pertinent to this proposition, and one to which we will refer at length later in this brief because of its direct bearing on the instant case, is that of *New York Lumber Trade Association* v. *Lacey*, 269 N. Y. 595, 199 N. E. 688, cert. denied 298 U. S. 684, in which the highest court of the State of New York held:

> "For the reason stated, it may be assumed that it is the rule that, ordinarily complaints of unfair prac-

tices must be submitted in the first instance to the Commission. Claim is made by the respondents that the exception to this rule governs here, and that the unfair practice of which complaint is made, is, in reality, a discriminatory enforcement of a fair rule But manifestly the gravamen of the action is a rule promulgated by the carriers, which is of general application, and that is to deal with shippers only in the event their trucks are manned by union employees. It is the rule itself and not the enforcement thereof which is in issue here."

A case on this proposition very similar to the case at bar is *Midland Valley Railroad Company* v. *Barkley*, 276 U. S.482, 48 S. Ct. 342.

Other cases holding that exclusive primary jurisdiction for the determination of this and like questions is in the Interstate Commerce Commission are:

[fol. 443] *Robinson* v. *Baltimore & Ohio Railroad*, 222 U. S. 506, 32 S. Ct. 114;

Western Etc. Railroad v. *Georgia Public Service Commission*, 267 U. S. 493, 45 S. Ct. 409;

Board of Railroad Commissioners v. *Great Northern Railway Co.*, 281 U. S. 412, 50 S. Ct. 391;

St. Louis, Etc. Railway Company v. *Brownsville, Etc.*, 304 U. S. 295, 58 S. Ct. 868; and

Thompson v. *Texas-Mexican Railway Company*, 328 U. S. 134, 66 S. Ct. 937.

The general rule is, as set forth in the cases, that where reasonableness or legality of a party was subject to the Interstate Commerce Commission, "the court should stay its hand until the Commission has passed on the matter."

There are numerous other pertinent decisions to the same effect which will be discussed under the other subpropositions of this Proposition of Law No. 4.

(2) The Interstate Commerce Act supersedes and is superior to State law.

The entire matter of the duties and practices of common carriers in interstate commerce is covered by comprehen-

sive Federal regulation. See the three volumes reporting Title 49 of the U. S. Code.

Note that 49 U. S. C. A., Section 316 (d) provides:

". . . It shall be unlawful for any common carrier by motor vehicle engaged in interstate commerce . . . to subject any particular person . . . to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . ."

[fol. 444] Section 316 (e) of Title 49 U. S. C. A. provides:

"any person . . . may make complaint in writing to the commission that any such . . . practice is or will be in violation of this section or of Section 317 . . . Whenever . . . the Commission shall be of the opinion that . . . any practice whatsoever of such carrier or carriers . . . is or will be unjust or unreasonable, or unjustly discriminatory . . . *it shall determine and prescribe* the lawful . . . practice thereafter to be made effective and *the commission shall* . . . after hearing . . . *establish through routes . . . or practices* . . . and the terms and conditions under which such through routes are to be operated . . ." (Emphasis added.)

Moreover, Title 49, Section 322 (b) provides:

"If any motor carrier . . . operates in violation of any provisions of this chapter (except as to the reasonableness of rates, fares, or charges and the discriminatory character thereof) or any rule, regulation or requirement or order thereunder, or of any term or condition of any certificate or permit, *the Commission* or its duly authorized agent *may apply to the District Court of the United States* for the district where such motor carrier operates for the enforcement of such provision of this chapter, or of such rule, regulation, requirement, order, term or condition; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such carrier or broker, his

or its officers, agents, employees, and representatives from further violation of such provision of this chapter or of such rule, regulation, requirement, order, term, or condition and enjoining upon it or them obedience thereto." (Emphasis added.)

[fol. 445] The Federal Act represents a comprehensive effort on the part of the Federal Government to control in all ways and manners the transportation of goods in interstate commerce defining the duties and obligations of motor carriers engaged in such transportation, and setting up procedures for investigation and determination of alleged violations of their obligations and duties as common carriers. The Act was designed to achieve uniformity in the transportation system and to prevent imposition of conflicting duties and obligations by local regulation. By so doing, Congress has pre-empted the field (other than safety of highways), and has made it powerless for either state courts or state administrative bodies to act in such field. *Armour & Co.* v. *Alton R. R. Co.*, 312 U. S. 195, 85 L. Ed. 771, 61 S. Ct. 498; *Mitchell Coal & Coke Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 247, 50 L. Ed. 1472, 33 S. Ct. 916; *B. & O. Railroad Co.* v. *U. S. ex. rel. Pilcum Coal Co.*, 215 U. S. 481, 30 S. Ct. 164; *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350; *St. Louis, Brownsville & Mexico Ry. Co.* v. *Brownsville Navigation Dist.*, 304 U. S. 295, 82 L. Ed. 1357 at 1361; *T. & P. Railway* v. *American Tie & Timber Co.*, 234 U. S. 138, 34 S. Ct. 885; *Great Northern Ry. Co.* v. *Merchant's Elevator Co.*, 259 U. S. 285, 42 S. Ct. 477, 66 L. Ed. 943; *Terminal Warehouse Co.* v. *Pennsylvania Railway Company*, 297 U. S. 500, 56 S. Ct. 546. See also *Illinois C. R. Co.* v. *DeFuentis*, 236 U. S. 157, 35 Sup. Ct. 275, holding that State may not control the local interchange of interstate freight since this constitutes "a [fol. 446] part of interstate commerce, the regulation of which Congress has undertaken, and consequently the order of the state commission transcends the limits of its powers" 35 Sup. Ct. 275, 276.

The gist of the holding of all of these cases is that the adjudication of issues presented in the field of interstate transportation are necessarily complex ones of fact to which

a uniform law is to be applied, and that the ascertainment of the facts must be made by the special administrative body created by law for that purpose, and the law then applied to the facts as so determined.

In the *St. Louis, Brownsville & Mexico Railway case,* supra, which dealt with a factual situation arising in the State of Texas, the United States Supreme Court said:

> "The question whether the discrimination in the application of his (the carrier's) tariff covering the switching movement is unreasonable, is an administrative one. Appropriate consideration of it may extend to many facts and circumstances, including the influence, if any, of the discrimination upon the trustee's line hauls between other Texas ports and points in Mexico, and to the broad field of competition legitimately available to carriers, shippers and commodities seeking transportation between the United States and Mexico. And *the ascertainment of appropriate remedy for discrimination condemned calls for another administrative determination* involving, it may be, investigation of numerous conditions affecting transportation between the two countries. And *as determination of reasonableness of petitioner's refusal to furnish cars* [fol. 447] *for the transportation in question and the prescribing of change in the service, if any is to be ordered, are primarily within the regulatory powers of the Commission,* the district court rightly held that it was without jurisdiction and dismissed the cause. (Citing U. S. Supreme Court cases). The decree of the Circuit Court of Appeals must be REVERSED." (Emphasis added.)

If the rule were otherwise, the entire transportation system of the United States would be subject to the conflicting rules, decisions and injunctions of as many state courts and state administrative tribunals as there are in existence, and carriers could not know from one day to the next their duties or obligations as they travel from state to state, and are met with conflicting rules and injunctions in such states.

Similar holdings of the United States Supreme Court in-

validating State action with respect to matters about which the Federal Congress has legislated under the Commerce Clause are found in *New York Lumber Trades Ass'n* v. *Martin Lacey*, 281 N. Y. Sup. 647, affirmed *per curiam* 199 N. E. 688, and see the same case 200 N. E. 54, holding as follows:

> "This court having held that if there is any illegality in defendants' actions, it arises from encroachment upon rights regulated by the Shipping Act; and that while this court has jurisdiction of the labor unions, yet, the courts of this state shall not grant an injunction until the Shipping Board has by its order defined plaintiff's rights."

Certiorari was denied in 298 U. S. 684, 80 L. Ed. 1404, 56 S. Ct. 954. The same result is reached by the U. S. [fol. 448] Supreme Court in construing the United States Warehouse Act, 7 U.S.C.A. Sec. 241, et seq. See *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 67 S. Ct. 1146, where it was held at Page 1155:

> "Thus, by eliminating dual regulation and substituting regulation by one agency, Congress sought to achieve 'fair and uniform business practices' which as noted in Federal Compress & Warehouse Company v. McClean, supra, 291 U. S. at page 23, 54 S. Ct. at page 269, 78 L. Ed. 622, was the purpose of the amended Act."
>
> "The test, therefore, is whether the matter on which the state asserts the right to act, is in any way regulated by the Federal Act. If it is, the Federal scheme prevails although it is a more modest, less pervasive regulatory plan than that of the state . . ."

Federal Congressional intent that no injunction should issue in view of I.C.C.'s exclusive jurisdiction is apparent not only from the Interstate Commerce Act and the Motor Carrier Act discussed above, but likewise, from the language used in the Clayton Act, 15 U. S. Code, Section 26, which provides in substance that nothing contained in the Federal Anti-Trust Acts shall permit a suit for injunction

by any person, excepting only the Attorney General of the United States, where the matter complained of is:

> "subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."

In the case of *Central Transfer Company* v. *Terminal Railway Ass'n*, 288 U. S. 469, 53 S. Ct. 444, it was held that the obvious purpose of that provision was:

> [fol. 449] "to preclude any interference by injunction with any business or transactions of interstate carriers of sufficient public significance and importance to be within the jurisdiction of the Commission, except when the suit is brought by the Government itself."

Similarly, in *Terminal Warehouse Co.* v. *Penn. Ry. Co.*, 297 U. S. 500, 56 S. Ct. 546, it was pointed out that:

> "if a sufferer from the discriminatory acts of carriers . . . may sue for an injunction under the Clayton Act without resort in the first instance to the regulatory commission, the unity of the system of regulation breaks down beyond repair."

Congress thus dealt directly with the problem of State and Federal regulation of motor carrier transportation, either interstate or intra-state in character. Congress indicated no consent to share with the states its exclusive jurisdiction over the regulation of interstate commerce. If it had intended to do so that would have been the place to express such an intent. The language used reflected not merely an absence of Congressional consent to the sharing of its jurisdiction over any form of interstate commerce. On the contrary, especially when read with Section 203(b)(9), it evidenced a conscious Congressional dissent from any such sharing of its jurisdiction over this form of interstate commerce described in this legislation.

The Uniform Bill of Lading prescribed by the Interstate Commerce Commission and which has the force and effect of law reads:

> "except in case of negligence of the carrier (and [fol. 450] the burden to prove freedom from negligence

shall be on the carrier), the carrier shall not be liable for loss, damage, or delay resulting from riots or strikes."

(3) The Federal courts have exclusive jurisdiction to interpret, apply and enforce the Interstate Commerce Act.

The discussion under Section A (2) of Proposition of Law No. 4 above is applicable to this statement. It is academic that the federal district courts have exclusive jurisdiction to interpret, apply and enforce laws of the United States. The function of fixing responsibility for damages due to a strike is that of the Federal courts and not of the State courts. See *Adams Express Co.* v. *Croninger*, 226 U. S. 491, wherein the Supreme Court of the United States held:

> "That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under the bill of lading which he must issue and limits the power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulations or interference with it."

(4) The Federal rule as to reasonableness in such cases controls. This rule is that a labor dispute as in the instant case is sufficient to make the refusal reasonable.

The Federal rule was established as early as 1896 by the [fol. 451] Circuit Court of Appeals for the 8th Circuit in *Empire Transportation Company* v. *Philadelphia & R. Coal Co.*, 77 Fed. 919. This case involved a libel against a ship company for failure to promptly discharge a vessel. The defense was that the existence of a strike caused the delay and that the Company had exercised reasonable diligence. The Court held that the implied contract was to unload within such time as is "reasonable", in view of all existing facts and circumstances, ordinary and extraordinary, legitimately bearing upon that question at the time of the arrival and discharge of the vessel. The test then is the reasonableness of the excuse. In *Pennsylvania Railroad Co.* v.

Olivit Bros., 61 L. Ed. 908, 243 U. S. 574, the United States Supreme Court endorsed the principle enunciated in the *Empire Transportation Co. case* and held that a carrier might successfully defend against an action for failing to perform its statutory duty by showing that a strike or an accumulation of freight caused by a strike caused the delay in executing its contract to deliver the property. This problem is competently and thoroughly discussed by an expert in the field in an article appearing in the Minnesota Law Review of February 1949 (Pages 255-282). Mr. Charles H. Woods, Lecturer in Law at the University of Arizona College of Law and formerly General Attorney and General Solicitor for the A. T. and S. F. Railway Company under the caption "The Plight of a Strike-Bound Carrier". This same article is reprinted in the I.C.C. Practitioners' Journal, June 1949, Vol. XVI, No. 9. In closing a discussion on the rule in the Federal courts, Mr. Woods says:

> [fol. 452] "It is clear to the writer that there is a Federal rule on the subject of the carrier's liability for the consequences growing out of a strike, and that such Federal rule would prevail over any contrary State rule. It is equally clear that the rule established by the Federal decisions is the general rule of reasonable care under all the facts and circumstances prevailing at the time."

The rule as defined by Mr. Woods is well substantiated by decisions of the Interstate Commerce Commission. In *Montgomery-Ward & Company* v. *Chicago M. S. P. & P. Railway*, 268 I.C.C. 257, the complainant charged negligence against the railroad because it was alleged to have made no effort to secure or obtain non-union drivers, where both truck and rail employees of the carrier turned back at a picket line at the Company's place of business. The Commission dismissed the complaint, holding that it was clear from the testimony that an effort to employ non-union men to break the picket line would have resulted in a strike by the union trainmen and caused a complete stoppage of traffic with disastrous results to the public. The Commission in this case, and many others, recognized the general rule laid down by the courts that under the common law

the carrier was under no absolute duty to serve. The carrier was only required to exercise the diligence of an ordinary prudent man under the circumstances.

In *Consolidated Freightways*, 42 M.C.C. 225, the Commission said:

> "We find that the defendant's failure to serve the [fols. 453-464] complainant was primarily caused by a strike at complainant's plant, for which the defendants were not responsible, and that because of the strike they were physically prevented from serving the complainant, and accordingly their conduct was within the limitations and conditions of the applicable tariff with respect to impracticable operation and not unlawful. The relief sought is, in substance, an order to the defendants, commanding them to serve the complainant regardless of their incapacity to do so because of a strike and because of their labor agreements. As the defendants do not control the situation, *and as an order could not be directed against their employees, or the union*, the practical effect of such an order would be to embroil the defendants in a labor dispute with their own employees, and would merely add to the defendant's difficulties." (Emphasis added.)

Again quoting from the Commission in the *Consolidated Freightways* case:

> "Common carriers are bound to transport goods promptly, but they are not insurers of prompt transportation. Their duty is that of reasonable diligence. For mere delay not affecting the safety of the merchandise transported, there is no liability if due diligence is proved.
>
> "A common carrier's duty to receive and transport is not an absolute one, but is subject to reasonable limitations and conditions, and it may refuse to receive property for shipment if transportation on its lines, or the lines of a connecting carrier, has become impossible or impracticable because of circumstances beyond its control as for a strike, the strike not being induced or caused by the carrier."

[fols. 465-474] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

ORDER PERMITTING THE FILING OF ADDITIONAL AUTHORITY, ETC.—December 18, 1953

Came appellants, by counsel, and filed motion to file additional authority, which motion is sustained. 12/18/53.

[fol. 475] COURT OF APPEALS OF KENTUCKY

[Title omitted]

ORDER MODIFYING OPINION AND OVERRULING PETITION—February 5, 1954

The Court being sufficiently advised, the petition of appellants for a rehearing be and the same is hereby overruled, and opinion modified on its face.

[fol. 476] IN COURT OF APPEALS OF KENTUCKY

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION #89, et al., Appellants

vs.

THE AMERICAN TOBACCO COMPANY, INC., Appellees

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division, Honorable Stuart Lampe, Judge

OPINION OF THE COURT BY JUDGE STEWART AFFIRMING ON THE APPEAL AND ON THE CROSS-APPEAL—June 2, 1953

Two questions are presented for determination on this appeal and cross-appeal:

1. Are the pickets around the property of the American Tobacco Company, herein referred to as "American," at 17th and Broadway Streets in Louisville, involved in pri-

mary or secondary picketing, since the strike is conducted at the same address against American Suppliers, Incorporated, herein called "Suppliers"?

2. May a driver of a common or contract carrier be compelled against his wishes by injunctive process to cross a picket line advertising a lawful strike, when the driver is a member of the same union that is conducting the strike but he is not on strike himself?

We have chosen to consider the cross-appeal, or question No. 1, first.

[fol. 477] On March 30, 1952, Local Union No. 89 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America of the American Federation of Labor, hereinafter referred to as "Local 89" for the stake of brevity, called a strike against Suppliers and threw picket lines around four of its establishments, viz.: A redrying plant at 9th and Magnolia Streets; an office with a small warehouse attached at 908 South 8th Street; a group of warehouses at 7th Street and Arcade Avenue; and a "stemmery" situated upon American's property at 17th and Broadway Streets. Suppliers is a subsidiary of American, but it is not a party to this appeal.

It is the picketing on all sides at the last mentioned location that is the bone of contention. The stemmery is situated on ground owned by American and is completely surrounded by American's cigarette factory, its auxiliary structures and its fences. American maintains that its main gates are on Broadway and that they are not and have never been used for ingress and egress of either personel or materials of Suppliers except to some small extent. On the other hand it states that access can be had to Suppliers for all purposes from 17th Street. It is therefore perfectly practical, American argues, to set aside the entire side on Broadway for its exclusive use and thereby prevent it from becoming entangled in the labor dispute that exists only between Local 89 and Suppliers. Furthermore, American asserts it is engulfed in this controversy solely because of its corporate and geographical relations with Suppliers, but that there is not now and there has never been any affiliation between its employees and Local 89, so that it is being subjected to a secondary boycott by the

conduct of the union, and that the sphere of picketing can and should be restricted to the disputants in such a manner as to relieve it from damaging results that flow therefrom. Local 89 takes the position that the picketing is primary, proper and legal. The Chancellor adopted the view of [fol. 478] Local 89, and American has cross-appealed from the judgment in this respect. Accordingly, we must search the record to resolve whether this finding has a reasonable basis in the evidence.

We have mentioned the physical layout of the stemmery. Aside from this, American and Suppliers have an economic interdependence; or, it might be said that Suppliers is the child of American, its parent, because the latter owns all the capital stock in the former. Suppliers buys raw tobacco and puts it through a certain process at the stemmery. The tobacco is then transported from the stemmery to American's cigarette factory by means of a conveyor belt which runs from one to the other. Suppliers sells all its tobacco to American. It was brought out that American owns not only the land but the improvements employed by Suppliers in the operation of the stemmery. There was testimony that Suppliers leased the ground and the plant and paid rent to American for the use of the same; however, the terms of the lease and the amount of the rent were unknown to the local officials of either corporation. A central power plant on the property supplies steam to the facilities of both corporations, Suppliers paying for this service. The trucks of Suppliers carry advertisements of "Lucky Strike," a well-known manufactured product of American. Over the entrance of another plant of Suppliers at 7th and Arcade Streets, which is not immediately connected with this litigation, the name on the sign reads: "American Tobacco Company." At times employees of Suppliers work for American and the latter pays the former for such services. Employees of Suppliers also receive four packages of American made cigarettes as a part of their weekly compensation. If an employee of Suppliers is badly injured or becomes seriously ill, that person is sent to American's hospital for treatment. To sum up, Suppliers and American operate as a unit, except that each is a corporate entity [fol. 479] and each is under separate management locally.

In the light of the foregoing factual background, we are confronted with this question: Is American a neutral in the existant dispute between Suppliers and Local 89? The test to be applied in arriving at a proper conclusion on this point may be thus stated: "An important factor in determining whether the activities of a union against an employer other than the one with which the union has a labor dispute come within the purview of the secondary boycott provision is the relationship between the two employers. If the relationship is so close that one may be regarded as the 'ally' of the other, picketing of one may be permissible during a labor dispute with the other." See 16 A. L. R., 2d paragraph 6, page 6. However, we are not without precedent on this subject in this jurisdiction.

In the recent case of Local 181, etc. v. Broadway and Fourth Avenue Realty Company, Ky., 248 S.W. 2d 713, a strike involved a corporation which owned and operated the Brown Hotel and the Kentucky Hotel and another corporation which owned and operated the Martin Brown Building, all located in Louisville. Both corporations were, except for qualifying shares, entirely owned by Mr. Graham Brown. In this opinion, in passing on a contempt proceeding we not only treated the whole controversy as a single labor dispute but we considered Mr. Graham Brown and the two corporations as in reality one and the same. There we said:

> "Supporting the conclusion that this is in the broad sense one labor dispute, is the fact that when the strike first commenced, picketing was begun at the Martin Brown Building, as well as the two hotels, although at that time there was no claim of a labor dispute affecting the employees of the Martin Brown Building. [fol. 480] "In the eyes of the public, this has been a strike against Mr. Graham Brown, and the acts of violence have been committed by persons having a labor dispute with Mr. Brown."

We think the industrial alliance between Suppliers and American is so close that both may be considered as one operation. From the standpoint of physical setup the two are so enmeshed that they cannot be split apart without

doing violence to both. To suggest that American has no interest in the dispute between Suppliers and Local 89 is to look at the form and remain blind to the substance. Nor can the naked claim of corporate separability be raised as a bar to picketing the primary employer at 17th and Broadway Streets. To remove the pickets from any side of this property would be to remove them from Suppliers at that location. It cannot, therefore, be said that American is a neutral under the circumstances and that the picketing amounts to a secondary boycott at the above address. We conclude that the Chancellor correctly disposed of this issue.

Local 89 seeks by its appeal to nullify so much of the injunction as requires a driver of a common or contract carrier to cross against his will a picket line where a strike is in progress. It so happens in this instance that the carrier employees are members of the same union as those conducting the strike against Suppliers. It should be emphasized, however, that they refuse to handle freight for American while remaining in the service of their employer.

The rule of law that common carriers and their employees must serve all members of the public without discrimination is firmly established in Kentucky and, so far as we can find, in all the States. Its origin goes far back into the common law. Section 196 of the Constitution of Ken- [fol. 481] tucky embodies the principle in this language: "Transportation of freight and passengers by railroad, steamboat or other common carrier, shall be so regulated, by general law, as to prevent unjust discrimination. No common carrier shall be permitted to contract for relief from its common law liability." Subsections 1 and 2 of KRS 281.685 read in part that no common or contract carrier shall "subject any person to any unreasonable discrimination." KRS 281.990(1) stipulates that any person who "violates, or causes, aids or abets any violation of, any of the provisions of this chapter," which includes KRS 281.685 (1) and (2), "shall be fined not less than fifteen dollars nor more than two hundred dollars, or imprisoned for not more than thirty days or both."

The foregoing doctrine is set forth at length in 9 Am.

Jur., Carriers, section 286, pages 607-608, and in 13 C.J.S., Carriers, section 27, pages 61-62.

In Burlington Transp. Co. v. Hathaway (Iowa, 1943), 12 N.W. 2d 167, a suit was brought by certain common carriers as plaintiffs against the teamsters, chauffeurs, warehousemen and helpers union and its business agents as defendants to enjoin the latter from requiring employees of the union to refuse to handle the goods of John Blaul's Sons Company, a wholesale grocery company in Burlington, Iowa, which the union was attempting to organize. A picket line had been thrown around the grocery company and the employees of the union refused to transport freight for the grocery company. The Iowa statute as to nondiscrimination by carriers is similar to Kentucky's. The substance of the Court's decision is as follows:

> "When the plaintiffs obtained their permits to operate as common carriers, they undertook the duty to transport the freight which the public tendered to them for transportation. The failure to carry out this [fol. 482] duty to transport would not be excused by showing that its employees refused to obey the employers' order. See Chicago B. & Q. R. Co. v. Burlington, C. R. & N. Ry. Co. et al., C. C., 34 F. 481, and Consolidated Freight Lines, Inc., et al. v. Department of Public Service, et al., 200 Wash. 659, 94 P. 2d 484, 485. In the last cited case a strike of laundry workers at the Davenport Hotel in Spokane resulted in a picket line around that hotel. Certain common carrier truck lines, who had been serving the hotel in the capacity of picking up freight or baggage and delivering it anywhere in the State of Washington or in the channels of interstate commerce, refused to send their trucks through the picket line at the hotel because the local manager of the teamsters' union threatened to call a strike of the carriers' drivers if they were permitted to go through the picket line. The hotel filed a complaint with the Department of Public Service against the carriers for the cancellation of their permits as common carriers. This resulted in an order suspending temporarily the permits under which the carriers operated. Upon appeal the action of the Commission was affirmed,

the Supreme Court of Washington stating: 'The question then arises whether the appellants were excused by reason of the law. They being common carriers, it was their duty, under the facts and circumstances of [fol. 183] this case, to send their trucks through the picket line. 13 C.J.S., Carriers, p. 407, sec. 202; Moore on Carriers, 2d Ed., Vol. 1, p. 124; Chicago, B. & Q. R. Co. v. Burlington, C. R. & N. Ry. Co., C. C., 34 F. 481; Burgess Bros. Co. v. Stewart, 112 Misc. 347, 184 N. Y. S. 199.'

* * * * *

"From the above it is clear that if the plaintiffs were to do that which the union sought to compel them to do, namely, not to handle the Blaul merchandise, they would be doing an act prohibited by the common law and the statutory law of this state and an act that could subject them to criminal prosecution.

* * * * *

"There was no labor dispute between plaintiffs and their employees or between plaintiffs and the defendant union. The union cannot concertedly exert, in aid of their labor dispute with Blaul, any economic pressure to compel these plaintiffs to do that which the law and public policy forbid. The injunction was rightly issued."

These cases support the rule laid down in the Hathaway case: Pacific Gamble Robinson Co. v. Minneapolis & St. Louis R. Co., (D. C. Minn., 1952) 105 F. Supp. 794; Northwestern Pacific R. Co. v. Lumber & Sawmill Workers Union, etc., (Cal., 1948) 189 Pac. 2d 277; Turner v. Zanes, (Tex., 1947) 206 S.W. 2d 144.

[fol. 484] Counsel for Local 89 admit that the Hathaway case correctly sets forth the law on the issue raised by the appeal as of the date it was decided, namely, in 1943, but they insist that the Labor-Management Relations Act of 1947, commonly called the Taft-Hartley Act, 61 Stat. 136 (1947), 29 U.S.C.A., Sec. 151, et seq., (Supp. 1952), makes the question under discussion one exclusively controlled by

this enactment. To fortify this position, reliance is had upon this part of 29 U. S. C. A., Sec. 158, also known as 8 (b) (4) (D) of the Act, which is as follows: " • • • • provided, that nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer) if the employees of such employer are engaged in a strike ratified or approved by representative of such employee whom such employer is required to recognize under this sub-chapter."

The appeal involves the refusal of employees of common or contract carriers who are not on strike but who happen to belong to Local 89, the bargaining representative of Suppliers' employees to transport the merchandise of American through the picket line at 17th and Broadway Streets, and this disobedience is not complained of as an unfair labor practice but as a violation of the common law, the statutory law and the Constitution of Kentucky. Aside from this, as we have shown, the illegal conduct of the employees could subject them to criminal prosecution. We find nothing in the provisions of the above Act or in the decisions of the Supreme Court of the United States construing it that makes such conduct legal when from time immemorial the several states have branded it as illegal. Furthermore, the Supreme Court has taken the position that federal jurisdiction cannot be invoked to protect a course of action, such as that in this case, that would be in conflict with the declared public policy of a state. See Local Union No. 10 [fol. 485] v. Graham, 344 U.S. 811, and the cases cited therein. It follows that the portion of the injunction requiring performance of the duty to carry American's goods in no way impairs the right to strike, the right to picket or any other right guaranteed by the federal law or the Constitution of the United States but that the order does, on the contrary, enforce obedience to the law and Constitution of the Commonwealth and, as a consequence, it was proper.

Finally, the employees of the carriers rely upon a provision of the agreement between themselves and their employers covering the period from February 1, 1952, to January 31, 1955, to the effect that it shall not be a violation of their contract or a cause for discharge to refuse to go through the picket line of a union or to refuse to handle

unfair goods. They insist that this stipulation excuses them from serving American. The legal duty of a common carrier to handle the merchandise of a shipper without discrimination existed long before the contract came into being, and, by like token, employees of such carriers, as long as they voluntarily remain in the hire of their employer, do not have the lawful right to withhold their services from a particular customer who deals with their employer. Here the common carrier and its employees seek by a contractual provision to avoid the responsibility imposed by a statute which implements a constitutional provision, and we hold that such a contractual stipulation is void.

The question of whether a contempt has been committed is left for the Chancellor's determination. Our reason for this ruling is that the contempt, if any, is continuous in its nature and it should not be handled piecemeal. Besides, the Chancellor is on the ground, is familiar with the background of this suit and is in a better position to hear the evidence; therefore, this phase of the case can be more expeditiously handled for all concerned in the lower court. [fol. 486] It appears to us that an emergency exists in this case and a mandate shall issue forthwith without prejudice to the right to file a petition for rehearing.

The judgment is affirmed on the appeal and on the cross-appeal.

Attorneys for Appellants: Hardy and Logan, 506 W. Jefferson St., Louisville, Kentucky, Robert Zollinger, Realty Building, Louisville, Kentucky.

Attorneys for Appellees: Nelson Helm, Stites, Wood, Helm & Taylor, Kentucky Home Life Building, Louisville, Kentucky.

[fol. 487] In Court of Appeals of Kentucky

Judge's Certificate

I hereby certify that the Court of Appeals of Kentucky did consider the points raised in the Appellants Petition for Rehearing in the case of General Drivers, Warehousemen, et al vs. The American Tobacco Company, Inc. at its winter term and that the Court rejected the points raised therein

and on February 5, 1954 overruled Appellants motion for rehearing and modified the Court's opinion on its face.

Brod. M. Stewart, Acting Chief Justice of Court of Appeals of Kentucky.

[fol. 488] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 489-491] Supreme Court of the United States

[Title omitted]

Order Extending Time to File Petition for Writ of Certiorari—Filed April 23, 1954

Upon consideration of the application of counsel for petioner(s),

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 3rd, 1954.

Stanley Reed, Associate Justice of the Supreme Court of the United States.

Dated this 23rd day of April —, 1954.

[fol. 492] [File endorsement omitted]

[fols. 493-494] Supreme Court of the United States
October Term, 1954

No. 186

[Title omitted]

Order Allowing Certiorari—Filed October 14, 1954

The petition herein for a writ of certiorari to the Court of Appeals of the Commonwealth of Kentucky is granted.

The Solicitor General is invited to file a brief setting forth the views of the National Labor Relations Board.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 495] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

JUDGE'S CERTIFICATE

I hereby certify that the Court of Appeals of Kentucky considered all the points and questions raised in the petition for rehearing and all of the points and questions were passed upon by the entire Court at it's Winter Term, and on February 5, 1954, the full Court overruled appellants' motion for rehearing and modified the Court's opinion on its face.

Brad. M. Stewart, Chief Justice, Court of Appeals of Kentucky.

[fol. 496] [File endorsement omitted.]